TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 88

NATHAN D. LEIMAN AND SAMUEL MARION,
PETITIONERS,

vs.

ALEXANDER GUTTMAN, GEORGE GELLER AND
ARTHUR BAINTON, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE
OF NEW YORK

PETITION FOR CERTIORARI FILED JUNE 10, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

NATHAN D. LEIMAN and SAMUEL MARION, Plaintiffs,

against

ALEXANDER GUTTMAN, GEORGE GELLER and ARTHUR BAINTON, individually and as officers and members of the Committee of Preferred Stockholders of Pittsburgh Terminal Coal Corporation; Howard S. Guttman, Monroe Guttman, Rudolph Guttman, Irene Guttman, Elizabeth Wolfers and Allen H. Berkman, Defendants.

NOTICE OF APPEAL—April 11, 1947

SIR:

Please take notice that the above-named defendants, except the defendant Berkman, hereby appeal to the Appellate Division of the Supreme Court, First Judicial Department, from an order entered in the above entitled action in the office of the clerk of the County of New York, on the 7th day of April, 1947, denying defendants' motion to dismiss the amended complaint on the ground that this Court [fol. 2] has no jurisdiction of the subject matter of the action, and from each and every part of said order.

Dated: New York, April 11th, 1947.

Yours, etc., Leo Praeger, Attorney for Defendants, Alexander Guttman, George Geller, Arthur Bainton, Howard S. Guttman, Monroe Guttman, Rudolph Guttman, Irene Guttman and Elizabeth Wolfers, Office & P. O. Address, 401 Broadway, Borough of Manhattan, City of New York.

To: Morris Berkeley, Esq., Attorney for Plaintiffs, 291 Broadway, New York City.

[fol. 3] NEW YORK SUPREME COURT, COUNTY OF NEW YORK

Special Term—Part III

Index No. 2773—1947

NATHAN D. LEIMAN and ano., Plaintiffs,

against

ALEXANDER GUTTMAN, etc., et al., Defendants

ORDER APPEALED FROM—April 7, 1947

Present: Hon. Louis A. Valente, Justice.

The following papers numbered 1 to 8 read on this motion, argued—decision reserved this 26th day of March, 1947.

Calendar No. 4420.

	Papers Numbered
Notice of Motion and Amended Summons & Amended Complaint Annexed	1-4
Answering Affidavits & Exhibits	5-7
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Upon the foregoing papers this motion for judgment dismissing the amended complaint is denied with leave to answer within ten days from the service of a copy of this [fol. 4] order with notice of entry (see memorandum filed herewith).

Opinion filed herewith.

Dated April 7, 1947.

Enter.

L. A. V., J. S. C.

Filed April 7, 1947. New York County Clerk's Office.

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

[Same title]

NOTICE OF MOTION—March 20, 1947

SIRS:

Please take notice that upon the summons and amended complaint in this action and the affidavit of Alexander Guttman, verified the 20th day of March, 1947, the undersigned will move this Court at a Special Term, Part III thereof, to be held in and for the County of New York, at the County Courthouse, Foley Square, in the Borough of Manhattan, City and State of New York, on the 26th day of March, 1947, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for a judgment dismissing plaintiffs' amended complaint, pursuant to Rule 107 of the Rules of Civil Practice, Section 2 thereof, on the ground [fol. 5] that the Court has not jurisdiction of the subject matter of the action, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, March 20, 1947.

Yours, etc., Leo Praeger, Attorney for Defendants, Alexander Guttman, George Geller, Arthur Bamton, Howard S. Guttman, Monroe Guttman, Rudolph Guttman, Irene Guttman and Elizabeth Wolfers, Office & P. O. Address, 401 Broadway, New York City.

To: Morris Berkeley, Esqs., Attorney for Plaintiffs, 291 Broadway, New York City.

[fol. 6] SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

AFFIDAVIT OF ALEXANDER GUTTMAN, READ IN SUPPORT OF MOTION TO DISMISS COMPLAINT—March 20, 1947

STATE OF NEW YORK,
County of New York, ss:

Alexander Guttman, being duly sworn, says:

I am a defendant in the above entitled action and am fully familiar with all the facts and circumstances therein.

This action was commenced upon an alleged contract made by and between your deponent, as Chairman of Protective Committee of Preferred Stockholders of Pittsburgh Terminal Coal Corporation, and Nathan D. Leiman, Samuel Marion and Allen H. Berkman, as Counsel for said Committee.

The plaintiffs and defendant Berkman were employed to act for the Committee and to protect the interest of the Committee for Preferred Stockholders in a proceeding pending in the United States District Court for the Western District of Pennsylvania, under Chapter 10 of the Bankruptcy Act, entitled: No. 20716, In Bankruptcy, In the Matter or Pittsburgh Terminal Coal Corporation, Debtor. Proceedings for Reorganization of a Corporation under Chapter X of the Bankruptcy Act, and to generally protect [fol. 7] the rights and interest of the preferred stockholders in the affairs of Pittsburgh Terminal Coal Corporation.

On or about November 20, 1940 I retained plaintiff, Nathan D. Leiman, to represent the Committee for Preferred Stockholders. On or about April 3, 1941 Samuel Marion, plaintiff, was retained to represent the Committee. On or about April 16, 1941 Allen H. Berkman, one of the defendants herein, a Pennsylvania attorney, was retained by plaintiffs Marion and Leiman, with my consent as Chairman of the Preferred Stockholders Committee. At that time it was the understanding between the attorneys and myself that all services were to be paid for upon a contingent basis, depending upon the outcome of their efforts involving the affairs of the Pittsburgh Terminal Coal Corporation and that they would seek their compensation from the debtor estate.

Some time thereafter I was informed by Mr. Marion that the possibilities of receiving compensation from the debtor estate were rather slim and that he, Marion, would withdraw from the case unless some arrangements were made by the preferred stockholders to compensate him and his colleagues. I was in the unenviable position of submitting to Mr. Marion's demands or else retracing my steps in endeavoring to employ new counsel. Prior to Mr. Marion's demand; I, acting for the Committee, had informed the preferred stockholders of Pittsburgh Terminal Coal Corporation that if they, the preferred stockholders, joined the Committee for the purpose of uncovering mismanagement and malfeasance in the affairs of Pittsburgh Terminal Coal Corporation, they, the preferred stockholders, would be [fol. 8] incurring no obligation or liability of any kind, as Counsel had agreed to prosecute the preferred stockholders' claims upon a contingent basis. I, faced with the unhappy choice before me, succeeded in inducing members of my family and close associates to put into escrow five hundred and eighty-four shares of the preferred stock of Pittsburgh Terminal Coal Corporation for additional compensation to Counsel upon completion of the reorganization proceedings in the District Court for the Western District of Pennsylvania. Thereupon such shares were delivered in escrow to the Committee, and Counsel proceeded to discharge their duties to a certain extent and at the time set for petitioning the District Court for allowances, did petition the District Court for the Western District of Pennsylvania for an allowance in the sum of One Hundred and Twenty-Five Thousand ($125,000.00) Dollars, calling the Court's attention to the fact that I had disavowed my intent to live up to the alleged contract to deliver the stock held in escrow and asking the District Court to allow them the sum set forth in their petition. Mr. Justice Gibson, in the District Court for the Western District of Pennsylvania, allowed the plaintiffs and defendant Berkman the sum of $37,500.00 in addition to their expenses and I think fairly assumed that the agreement for additional compensation to the claimants had been set aside and was warranted by the statements in their own petition for an allowance, from which it was conceivably inferable that the claimants no longer expected compensation thereunder, but were looking to the estate for their entire allowance. The Securities and

[fol. 9] Exchange Commission submitted a brief to the District Court, wherein they stated:

> "The recommendation of the Securities and Exchange Commission for an allowance of $40,000.00 and expenses was based on the same assumption."

The assumption being that petitioners, plaintiffs in this action, together with defendant Berkman in this action, were seeking their compensation entirely from the estate. In a statement to the District Court on October 3, 1945, Counsel for the Securities and Exchange Commission, made this statement:

> "Our recommendation is based upon the assumption that the applicants will receive no further compensation for their compensable services."

It is my understanding that plaintiffs now claim the shares of stock deposited in escrow to compensate them for their non-compensable services and I wish to call this Court's attention to the fact that I have been advised by Counsel that pursuant to the provisions of Section 221(4) of the Bankruptcy Act (all compensation payable in a proceeding under Chapter 10 must be fully disclosed to the Judge and if fixed after confirmation of the plan of reorganization must be subject to the approval of the Judge.

I have been advised by Counsel that the statutes, together with its legislative history and cases decided thereunder, make it clear that all allowances for fees from any source whatsoever, must be subject to the approval and discretion of the District Court Judge who has the Chapter [fol. 10] 10 proceeding before him. It is for these reasons I contend that if plaintiffs have a claim upon me, other members of the Preferred Stockholders Committee or Preferred Stockholders, that their recourse, if any, would be a petition for further allowance for non-compensable services to the District Court which had jurisdiction over the entire reorganization proceeding. The Securities and Exchange Commission has constantly urged this position and I have been informed by Counsel that the leading cases on the subject, decided by the United State Supreme Court, give weight to this contention.

In addition to this Action, Allen H. Berkman, a defendant herein, has commenced an action, as plaintiff, in the Court

of Common Pleas of Allegheny County, Pennsylvania, for substantially the same relief sought by the plaintiffs in this action and I have moved through Counsel to dismiss the Pennsylvania action on substantially the same grounds set forth herein.

I respectfully urge that this Court decline to accept jurisdiction of the subject matter which is the basis of plaintiffs' complaint in that the redress of plaintiff's grievance, if any, properly belongs within the jurisdiction of the reorganization Court.

Alexander Guttman.

(Sworn to March 20, 1947.)

[fol. 11] Supreme Court of the State of New York

County of New York

Plaintiffs Designate New York County as Place of Trial.

Amended Summons, Read in Support of Motion to Dismiss Complaint—February 20, 1947

To the Above Named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within twenty (20) days after the service of this summons, exclusive of the day of service. In case of your failure to appear by answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, N. Y., February 20, 1947.

Morris Berkeley, Attorney for Plaintiffs. Office and P. O. Address, 291 Broadway, Borough of Manhattan, City of New York.

[fol. 12] SUPREME COURT OF THE STATE OF NEW YORK

County of New York

AMENDED COMPLAINT, READ IN SUPPORT OF MOTION

Plaintiffs, for their amended complaint, respectfully show and allege:

First. That the plaintiffs Nathan D. Leiman and Samuel Marion were at all the times hereinafter mentioned attorneys and counselors-at-law, practicing their profession as such in the Borough of Manhattan, City, County and State of New York; that the defendant Allen H. Berkman, at all the times hereinafter mentioned was and now is an attorney and counselor-at-law practicing his profession as such in Pittsburgh, Pennsylvania.

Second. That at the times hereinafter mentioned, proceedings for the reorganization of Pittsburgh Terminal Coal Corporation, under Chapter X of the Bankruptcy Act, were pending in the United States District Court for the Western District of Pennsylvania.

Third. That defendant Alexander Guttman at all the times herein mentioned, was and now is Chairman, defendant Arthur Bainton was and now is Secretary, and defendant George Geller was and now is a member of the Committee of Preferred Stockholders of said Pittsburgh Terminal Coal Corporation, and said Committee participated in said reorganization proceedings.

Fourth. That on or about April 3, 1941, the defendants, [fol. 13] except defendant Allen H. Berkman, retained plaintiffs to represent them in the said reorganization proceedings and to file in their behalf proofs on amended proofs of claim against the said Pittsburgh Terminal Coal Corporation for certain monies alleged to be due on preferred stock certificates under the sinking fund provisions relating thereto, and for other services in connection with the said reorganization proceedings, and agreed to pay to plaintiffs for their fee and disbursements therein, in addition to any sum allowed by the court, twenty (20%) percent of the stockholdings of the defendants and agreed to deposit with the defendant Alexander Guttman, Chairman of the Preferred Stockholders Committee, in escrow, 20% of their stockholdings, to be held by the said Alexander Guttman,

Chairman of said committee, until the completion of the said proceedings, at which time such stock would be delivered to plaintiffs.

Fifth. Thereafter, with the permission, consent and approval of the defendants, plaintiffs retained defendant Allen H. Berkman, an attorney, as their associate in Pittsburgh, in this matter.

Sixth. That thereafter the defendants Monroe Guttman, Irene Guttman, George Geller and Arthur Bainton deposited a total of 584 shares with the said Alexander Guttman, individually and as Chairman of the said Preferred Stockholders Committee, pursuant to an agreement in writing, a copy of which is hereto annexed, marked Exhibit A and made a part hereof.

Seventh. That thereafter and on or about December 23, 1943, plaintiff Nathan D. Leiman for a valuable considera-
[fol. 14] tion, assigned to plaintiff Samuel Marion 97⅓ shares of the preferred stock of the Pittsburgh Terminal Coal Corporation referred to in Exhibit A.

Eighth. That all proceedings in said reorganization have been substantially completed, but said defendants except defendant Allen H. Berkman, have failed and refused to turn over said 584 shares of preferred stock of Pittsburgh Terminal Coal Corporation, or any portion thereof, to the plaintiffs, although duly demanded, and said defendants have announced their refusal to abide by said agreement.

Ninth. Allen H. Berkman is made a party defendant herein because his consent to join as a plaintiff cannot be obtained, and his rights in and to said shares of stock and any moneys flowing therefrom, should be determined in this action.

Wherefore, plaintiffs demand judgment as follows:

(1) Against the defendants Alexander Guttman, George Geller and Arthur Bainton, individually and as officers and members of the Preferred Stockholders Committee directing them to forthwith assign and deliver to the plaintiffs 584 shares of the preferred stock of Pittsburgh Terminal Coal Corporation deposited with them in escrow as heretofore alleged; together with all dividends previously declared on said stock and all rights included thereunder.

(2) That the Court determine the rights of the said Allen H. Berkman in and to the said shares of stock and any moneys flowing therefrom.

[fol. 15] (3) That the plaintiffs have such other, further and different relief against the defendants as may be just and proper together with the costs of this action.

Morris Berkeley, Attorney for Plaintiffs, Office & P. O. Address, 291 Broadway, Borough of Manhattan, City of New York.

(Verified by Nathan D. Leiman, one of the plaintiffs, on February 21, 1947.)

EXHIBIT A, ANNEXED TO AMENDED COMPLAINT

To Nathan D. Leiman, Esq., Samuel Marion, Esq., Allen H. Berkman, Esq.:

DEAR SIRS:

This Committee holds 584 shares of Pittsburgh Terminal Coal Corporation Preferred stock obtained from the following individuals:

Monroe Guttmann	200 shares
Irene Guttmann	200 shares
George Geller	134 shares
Arthur Bainton	50 shares
Total	584 shares

These shares are held in escrow by this Committee pending the termination of all proceedings in the matter of the [fol. 16] Pittsburgh Terminal Coal Corporation.

This Committee has secured these shares from the stockholders listed above for the purpose of affording to you additional compensation for your services in the above matter. They have been obtained and are held in escrow on the condition that they be delivered to you only at such time as the reorganization proceedings in the matter of Pittsburgh Terminal Coal Corporation are finally terminated and a final settlement of all suits and claims made by this Committee in behalf of the preferred stockholders have been settled. It is further conditioned upon faithful and satisfactory per-

formance of your duties as counsel to this Committee until the termination of all proceedings.

The five hundred and eighty four (584) shares of aforementioned shares will be distributed as follows:

To Nathan D. Leiman	292 shares
To Samuel Marion	146 shares
To Allen H. Berkman	146 shares
Total	584

Very truly yours, —— ——.

AG:M.

[fol. 17] SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

ANSWERING AFFIDAVIT OF SAMUEL MARION, READ IN OPPOSITION TO MOTION TO DISMISS COMPLAINT

[Matters Underscored Are so in Original Copy Now on File]

STATE OF NEW YORK,
County of New York, ss:

Samuel Marion, being duly sworn, deposes and says: I am one of the plaintiffs herein. Most of the statements contained in the moving affidavit relate to the merits of the litigation and are wholly immaterial to a proper consideration of the issues raised by the motion. All of the said matters have previously been heard at length by Honorable R. M. Gibson, U. S. District Judge for the Western District of Pennsylvania in the Matter of Pittsburgh Terminal Coal Corporation, Debtor. For that reason, no detailed reply thereto will be made and it is requested that the failure to specifically deny any of said allegations shall not be deemed an admission of the truth thereof.

The moving affidavit of Mr. Guttman states that Judge Gibson in fixing the allowance to the plaintiffs and defendant Berkman in said reorganization proceedings at $37,500,

> "fairly assumed that the agreement for additional compensation to the claimants (meaning the agreement annexed to the complaint in this action) had been set aside"

and that

> [fol. 18] "it was conceivably inferable that the claimants no longer expected compensation thereunder but were looking to the estate for their entire allowance."

This statement is not in accordance with the facts as the defendant Guttman knows or should know.

When the application for allowance was made on October 3, 1945, there was an extended hearing in open court, at which Mr. Alexander Guttman was present. Counsel for the Securities and Exchange Commission in making the statutory report to the Court on applications for allowance, and referring to the petition of the plaintiffs and defendant Berkman, said in part:

> "There can be no question as we show in further detail, that these applicants contributed to the favorable results finally achieved." (S. M. page 114)
>
> . . . . . .
>
> "it is the Commission's position that for the *compensable services*, that is for the services for which the Court has the power to compensate them, the services which were of benefit to the estate, we recommend a final allowance to these attorneys for the preferred stockholders committee in the sum of $40,000. . . . Our recommendation is based upon the assumption that the applicants will receive no other compensation for the *compensable services*." (Italics added) (S. M. page 119)
>
> . . . . . .
>
> [fol. 19] "To summarize our recommendation to counsel for the Preferred Stockholders, *it is our recommendation to the Court that they be allowed a final allowance of $40,000 for compensable services of benefit conferred upon the estate* and reimbursement of expenses in the total amount of $3847.65 . . . ." (Italics added) (S. M. page 121)

On November 16, 1945, Judge Gibson fixed the allowance to plaintiffs and defendant Berkman at $37,500, and in a

memorandum accompanying the order making the allowance, the following pertinent paragraph appeared:

> "A joint allowance of $37,500.00 will be granted claimants. This is complicated by an agreement with members of the Protective Committee to hold a number of shares of the debtor's stock for the benefit of counsel. Counsel should not have their compensation duplicated, and the present order is made upon the statement that the original agreement with the Protective Committe is set aside. Mr. Marion is allowed $2,364.54, Mr. Berkman $1,044.23, and Mr. Leiman $13.87 for expenses."

On November 26, 1945, an ex-parte order was entered by Judge Gibson amending said memorandum so as to read as follows:

> "A joint allowance of $37,500.00 will be granted claimants, *without prejudice;* however, to any rights which said claimants have in an agreement, whereby certain stockholders deposited 584 shares of debtor's [fol. 20] preferred stock in escrow with the Protective Committee for Preferred Stockholders of Pittsburgh Terminal Coal Corporation, Debtor, as additional compensation to said claimants for their services, as more fully set forth in a letter from Alexander Guttman to said claimants, which letter is referred to on page 34 of claimants' petition for allowances and offered in evidence at the hearing on petitions for allowances held October 3, 1945. Mr. Marion is allowed $2,364.54, Mr. Berkman $1,044.23, and Mr. Leiman $13.87 for expenses."

On January 17, 1946, an application was made by the defendants to vacate said last mentioned order because no notice thereof was given. A hearing thereon was held on January 17, 1946 which resulted in an order entered August 23, 1946 vacating the memorandum and order of November 26, 1945 and directing that on September 10, 1946,

> "* * * the Court will hear testimony as to the scope of the deposit by Preferred Stockholders of the debtor of 584 shares of said preferred stock as additional compensation to Messrs. Samuel Marion, Allen H. Berkman and Nathan L. Leiman * * *".

On September 10, 1946, an extended hearing was held before Judge Gibson at which the plaintiffs, defendant Berkman, and the defendant Alexander Guttman testified at length and submitted documentary proof as to the scope of the deposit by preferred stockholders of stock, under the [fol. 21] agreement annexed to the complaint, and if it was intended to be payment for noncompensable services. Voluminous briefs were submitted by the defendants, plaintiffs and the Securities and Exchange Commission.

On January 22, 1947, Judge Gibson handed down an opinion, a copy of which will be submitted to the Court on the argument of this motion. The Court's attention is particularly directed to the following excerpts from said opinion:

> "Alexander Guttman, chairman of the Preferred Stockholders' Protective Committee, while not denying that claimants had rendered services which could not be charged against the Debtor, and which were rendered at a time when any such compensation from the debtor's estate seemed improbable, asserted that the deposit of stock in escrow was to be effective only in case no considerable award should be made from the debtor's estate. He also contended that of the 584 shares mentioned in the agreement, 146 shares were to be returned to certain of his relatives."
>
> . . . . . .
>
> "The Court has had no difficulty in determining that the claimants rendered services to the preferred stockholders named in the escrow agreement which were not compensable from the fund distributed by order of the court."
>
> . . . . . .
>
> [fol. 22] "That such services to the Preferred Stockholders Committee, at the request of its members, are entitled to a reasonable recompense seems unquestionable if the escrow agreement is to be reasonably interpreted. As to the method of recompense, however, considerable controversy has arisen."
>
> . . . . . .
>
> "The judgment, if any were entered, would be directly against the stockholders. Even if it were admitted that

> the court had jurisdiction to reduce the amount of the fee contract, where such course is practicable, a direct charge against the depositing stockholders, who are disputing the right to recover any amount in view of the uncertainty as to the value of the stock deposited seems to stretch the interpretative powers of the court too far. "Feeling that the court has not jurisdiction to make such a charge against the depositing stockholders, an order will be made in substance repeating the order of this court of November 26, 1943."

and in connection with said opinion, the Court entered an order which provided that the $37,500 allowance granted to the plaintiffs and defendant Berkman,

> "as compensation for services rendered the Estate of the debtor in the reorganization proceeding * * * was without prejudice to such rights as said Marion, Berk- [fol. 23] man and Leiman may have in an agreement (the agreement annexed to the complaint) * * * and the Court further finds that it is without present jurisdiction to determine the value of the additional services rendered * * *".

This effectively disposes of the statement contained in said affidavit as well as the position of the Securities and Exchange Commission. It further is an adjudication on the claim previously asserted in the District Court that the District Court has sole jurisdiction of compensation of counsel.

This action was commenced by the personal service of the summons on certain of the defendants on January 27, 1947. Thereafter and on February 17, 1947, all of the defendants appeared by William M. Kilcullen. Allen H. Berkman, who originally was a plaintiff in this action, instructed your deponent that he did not wish to continue as a plaintiff and after the commencement of this action, instituted an action in the State Courts in Pennsylvania. It was therefore necessary to amend the summons and complaint designating Allen H. Berkman as a defendant rather than a plaintiff. That was the only change in the pleadings.

On February 17, 1947, the time of the defendants to answer was extended to and including ten days after service of the amended complaint.

On February 20, 1947, the said William H. Kilcullen signed a stipulation that the summons and complaint be amended by striking out the name of Allen H. Berkman as a party plaintiff and naming him as a defendant.

[fol. 24] On February 21, 1947, Mr. Kilcullen acknowledged service of the copy of the amended summons and complaint. The time to answer the amended complaint therefore expired on March 3, 1947.

On March 12, 1947, your deponent wrote to defendants' counsel offering to waive the default in pleading and to accept the answer on March 14th, (later orally extended to March 19th), on the understanding that the answer would not be further amended and that the action would be noticed for the April Term. No answer was served, but the present motion was served on March 20th, 1947. The defendants (except Berkman), are now in default in pleading.

All of the defendants except defendant Berkman, reside in the city of New York. The stock involved in this action is located in the city of New York. Judge Gibson of the United States District Court has previously passed upon the defendants' contention that the matter should be determined by the District Court and has referred the parties to the remedies in the State Court. There is no merit in the pending application which, in the opinion of your deponent, is brought merely for purposes of delay.

Wherefore, your deponent respectfully prays that the motion be denied, with costs.

Samuel Marion

(Sworn to March 24, 1947.)

[fol. 25] Opinion and Order Inadvertently Omitted from Record on Appeal

Order

In the District Court of the United States for the Western District of Pennsylvania

In the Matter of Pittsburgh Terminal Coal Corporation, Debtor

(In Proceedings for the Reorganization of a Corporation under the Bankruptcy Act.)

(No. 20716 In Bankruptcy.)

And now, to wit, January 22, 1947, it appearing after due hearing that the allowance of $37,500.00 granted to Samuel Marion, Allen H. Berkman and Nathan D. Leiman by order of this court of November 16, 1945, as compensation for services rendered the estate of the debtor in the reorganization proceedings at No. 20716 in Bankruptcy, was without prejudice to such rights as said Marion, Berkman and Leiman may have in an agreement whereby certain stockholders of said debtor deposited 584 shares of debtor's preferred [fol. 26] stock in escrow with the Preferred Stockholders' Protective Committee of said debtor as additional compensation to said claimants for their services to said stockholders, as more fully appears in a letter from Alexander Guttman to said claimants (which letter is referred to on page 34 of claimants' petition for allowances held Octobe. 3, 1945), and the court further finds that it is without present jurisdiction to determine the value of the additional services rendered to said depositing stockholders by said Marion, Berkman and Leiman and to charge the amount thereof to said stockholders.

(Signed) R. M. Gibson, District Judge.

[fol. 27] OPINION

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In the Matter of PITTSBURGH TERMINAL COAL CORPORATION, Debtor

(In Proceedings for the Reorganization of a Corporation under the Bankruptcy Act.)

(No. 20716 In Bankruptcy.)

GIBSON, District Judge.

The present matter involves the claim of Samuel Marion, Allen H. Berkman and Nathan D. Leiman, attorneys for the Preferred Stockholders' Protective Committee. Their claim is for "additional compensation" under the agreement in a letter signed by Alexander Guttman, chairman of the committee, which declared that 584 shares of preferred stock were held in escrow for the claimants as additional compensation for their services.

On November 16, 1945, the court allowed the claimants $37,500.00 out of the debtor's estate. Their claim for compensation was evidently misconstrued by the court, which qualified the allowance by stating that it "is complicated by an agreement with members of the Protective Committee to hold a number of shares of the debtor's stock for the [fol. 28] benefit of counsel. Counsel should not have their compensation duplicated, and the present order is made upon the statement that the original agreement with the Protective Committee is set aside". That misconception of the claim of counsel for the Preferred Stockholders Committee was perhaps due to the fact that they joined plainly non-compensable services with the compensable in their claim against the debtor's estate. Later the court, upon being satisfied that counsel had not intended to waive additional compensation under the deposit agreement by their claim for compensation from the estate, made an order which held, in part, that the allowance of $37,500.00 was made:

> "without prejudice * * * to any rights which said claimants have in an agreement, whereby certain stockholders deposited 584 shares of debtor's preferred stock in escrow with the Protective Committee for Preferred Stockholders of Pittsburgh Terminal Coal Corporation,

Debtor, as additional compensation to said claimants for their services."

This order, having been made without notice to the reorganized company and the Stockholders Committee, was later vacated as inadvertently made. The Pittsburgh Terminal Coal Corporation and the debtor's Committee, and with them the Securities and Exchange Commission, have contended that in a Chapter X proceeding the court has the duty of determining the reasonableness of all fees, whether compensable fees chargeable to the estate or for those which are non-compensable and which cannot be so charged. The claimants, on the other hand, have contended that the court [fol. 29] is without jurisdiction except as to claims chargeable to the debtor's estate.

These conflicting contentions having been made by the parties in interest, the court ordered that a hearing be had and testimony be introduced in order that the validity and scope of the claims of Messrs. Marion, Berkman and Leiman might be determined. At the hearing on September 10, 1946, the claimants alleged that, in addition to the services rendered by them to the Preferred Stockholders Protective Committee for which compensation had been allowed to the amount of $37,500.00, they had given other considerable legal services to the Preferred stockholders on whose behalf the 584 shares of stock had been deposited in escrow and were entitled to "additional compensation" from them.

Alexander Guttman, chairman of the Preferred Stockholders' Protective Committee, while not denying that claimants had rendered services which could not be charged against the Debtor, and which were rendered at a time when any such compensation from the debtor's estate seemed improbable, asserted that the deposit of stock in escrow was to be effective only in case no considerable award should be made from the debtor's estate. He also contended that of the 584 shares mentioned in the agreement 146 shares were to be returned to certain of his relatives. His counsel puts great stress upon an action brought in behalf of Rita Crepeau, et al., and treats it as though it were the foundation of the Trustee's action against the North American Coal Corporation, et al., which was the source of the ultimate fortunate recovery of the fund for [fol. 30] distribution. As a matter of fact the earliest

efforts of the claimants were hostile to, and not of benefit to the Trustee's action.

The court has had no difficulty in determining that the claimants rendered services to the preferred stockholders named in the escrow agreement which were not compensable from the fund distributed by order of the court. Among such services were those rendered in connection with the sinking fund claims, Guttman's criticism of the Trustee's sales of machinery and his management of the real estate, his rent collections and the repair of the debtor's houses and other property.

That such services to the Preferred Stockholders Committee, at the request of its members, are entitled to a reasonable recompense seems unquestionable if the escrow agreement is to be reasonably interpreted. As to the method of recompense, however, considerable controversy has arisen.

The claimants contend that this court is without jurisdiction to determine the amount. The present counsel for the preferred stockholders who have deposited the stock asserts that the court has power to pass upon the claim, but should deny any recovery to claimants in view of the testimony of Alexander Guttman. The Securities and Exchange Commission, on the other hand, contends that the court not only may pass upon the claim, but has the duty of so doing, and that the testimony entitles claimants to a determination of the amount to which claimants are entitled and to an order awarding that amount to them.

The Securities and Exchange Commission bases its contention upon its interpretation of Section 221-(4) of Chapter X of the Bankruptcy Act, which provides:

[fol. 31] "The judge shall confirm a plan if satisfied that * * *

"all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services, and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judges."

It will be noted that the conditional deposit of the stock in question was made prior to the confirmation of the reorganization plan.

Undoubtedly Section 221-(4) requires the court to scrutinize the proposed plan in respect to all the phases mentioned in it, and to determine whether the payments made or promised are reasonable or whether they tend to vitiate the plan. But nowhere in it is it recited that the court has the duty of both determining that such an amount paid or promised is reasonable and of making an order requiring the payment of such amount even though it cannot be charged to the fund for distribution. Under Chapter X administrative expenses are authorized, and those who have aided in the reorganization are entitled to compensation for their efforts; but they are awarded such compensation by means of an order upon the trustee by the court. If one had promised compensation to his counsel for his services in a reorganization, but his counsel has not aided in the proceeding, Section 221-(4), in the opinion of the court, [fol. 32] furnishes no authority for an order, upon the promisor to pay the counsel the amount promised or what, in the opinion of the court, is the reasonable value of his services. The existence and scope of the promise creates an issue not before the court.

In re Standard Gas & Electric Co., 106 Fed. (2d) 215, (3 Ct.) the court awarded counsel part of the claim, and stated as to the balance:

> "It is clear that much of his work duplicated that of others and was, therefore, not properly compensable out of debtor's estate. This, of course, is not to say that these services were not properly rendered to his clients, but merely that they should be paid by those clients alone."

The court did not undertake to order the payment by the clients.

In Greensfelder v. St. Louis Public Service Company, 114 Fed. (2d) 53, (8 Ct.) the court, after awarding part of the claim, held:

> "In reorganization proceeding under the Bankruptcy Act, the court, in allowing fees, was not concerned with amount of fees, which noteholders commit-

tee or the clients of attorney retained thereby, might be obligated to pay him."

In Zweifel v. Trans-State Oil Co., 99 Fed. (2d) 650, the agreement between the president of the debtor and his counsel was that counsel, in addition to the amount which would be awarded him by the court, should receive the sum of $10,000.00 payable after payment of the creditors as set out in the plan. The lower court held that such agreement was binding on the debtor, and failed to award counsel [fol. 33] any compensation for his services, although finding that his compensable services, had the agreement not been in evidence, were worth a sum less than $10,000.00. The Court of Appeals held:

"We concur with the court below that such agreement was binding on it (the debtor) in this proceeding, and that it had no jurisdiction to determine its validity as an obligation of the debtor; but we think the court erred in declining to allow any compensation to appellants payable out of the assets of the estate. There was no intention on the part of the debtor or its attorneys that the agreed amount of $10,000.00 should be in lieu of any such allowance by the court."

See also, in Re Watco Corporation, 95 Fed. (2d) 249.

As against the foregoing authorities, which reflect the opinion of this court, a quite respectable authority has been cited, and one which requires some courage when a lower court presumes to accept a contrary view.

In McCrory Stores Corporation, 91 Fed. (2d) 947 (2 Ct.) a committee of creditors engaged an attorney, paying him a retainer of $25,000, and agreeing to pay him 10% of any proceeds paid to creditors represented by him. The creditors were paid in full and in addition received interest to amount of 19%. By the agreement the attorney would have received $84,000.00. The District Court, sustained by the Court of Appeals, found that the services were reasonably worth only $35,000.00. The Court of Appeals [fol. 34] stated that the "scrutiny clause" of Section 77-B, (b) (10) (which is embodied in Chapter X, § 212), "authorized him (the District Judge), to restrain the committee from proceeding under the contingent fee agreement after the reorganization petition was filed", 91 Fed. (2d) at 949.

The order of the District Court allowed counsel $10,000, the $25,000 part of the fee having been paid when he was retained. This sum, by the order, was to be paid from an allowance to the creditors theretofore approved.

In respect to the charge to the creditors' allowance, the instant matter differs from the case cited. In the instant case no sufficient fund has been credited to the depositing stockholders against which any allowance to claimants could be charged. The judgment, if any were entered, would be directly against the stockholders. Even if it were admitted that the court has jurisdiction to reduce the amount of the fee contract, where such course is practicable, a direct charge against the depositing stockholders, who are disputing the right to recover any amount, in view of the uncertainty as to the value of the stock deposited seems to stretch the interpretative powers of the court too far.

Feeling that the court has not jurisdiction to make such a charge against the depositing stockholders, an order will be made in substance repeating the order of this court of November 26, 1945.

January 22, 1947.

[fol. 35] SUPREME COURT OF THE STATE OF NEW YORK

County of New York

REPLYING AFFIDAVIT OF ALEXANDER GUTTMAN, READ IN SUPPORT OF MOTION TO DISMISS COMPLAINT

STATE OF NEW YORK,
County of New York, ss.:

Alexander Guttman, being duly sworn, deposes and says:

I am one of the defendants herein and am fully acquainted with all the facts pertaining to this action and am familiar with this motion.

I submit this affidavit in reply to the answering affidavit submitted by the plaintiff, Samual Marion.

I have read the affidavit of Samuel Marion. Nowhere is there contained in his affidavit any statement which tends in anywise to confer jurisdiction of this action upon this Court. At great length Mr. Marion attempts to urge that the agreement made by the defendants with the plaintiffs

contemplated the payment of non-compensable services rendered by the plaintiffs as attorneys in the reorganization proceeding which is still pending in the United States District Court for the Western District of Pennsylvania. I emphatically deny that the defendants ever contemplated paying for any non-compensable services. Such idea on the part of Mr. Marion is completely an after-thought.

However, assuming, without conceding, that Mr. Marion might be entitled to the payment of a fee for non-compensable services rendered in the reorganization proceeding, [fol. 36] this Court would still lack jurisdiction of the subject matter, since all fees must be determined by the Court where the proceeding is pending.

I have been advised by my attorney that that is the law and I refer this Court to the brief submitted by my attorney on this point.

It should be noted by this Court that Mr. Marion in making his application for a fee to the U. S. District Court in the reorganization proceeding, asked for the sum of $125,000.00. In his petition, consisting of over one hundred pages, he detailed all of the services, including those which he now urges are non-compensable services. The Court, after considering the entire petition, awarded Mr. Marion and his associates the sum of $37,500.00.

As a matter of fact Mr. Marion disclosed to the District Court the very agreement upon which this amended complaint is founded and advised the Court that he did not expect to receive any compensation pursuant to that agreement. On page 34 of Mr. Marion's petition he made this very statement:

> "Mr. Guttman has advised your petitioners that he disavows said letter and will refuse to abide by the terms thereof."

Clearly, the plaintiffs are seeking payment once again for services for which they already have been paid and in any event the issue is one without the jurisdiction of this Court.

The motion to dismiss the amended complaint should be granted, as prayed for in the notice of motion.

Alexander Guttman.

(Sworn to March 26, 1947.)

[fol. 37] IN THE SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

OPINION OF MR. JUSTICE VALENTE

(New York Law Journal—April 8, 1947)

Leiman v. Guttman—This motion to dismiss the amended complaint is predicated upon the contention that the federal court, in charge of the reorganization proceeding, possesses exclusive jurisdiction of the subject matter of the action. That very court, however, has held that it does not possess such jurisdiction and it has therefore expressly ordered the allowances granted by it should be "without prejudice to such rights as said Marion, Berkman and Leiman may have in an agreement whereby certain stockholders of said debtor deposited 584 shares of debtor's preferred stock in escrow with the Preferred Stockholders Protective Committee of said debtor as additional compensation to said claimants for their services to said stockholders." The order of the federal court, dated January 22, 1947, concludes with the words "The court further finds that it is without present jurisdiction to determine the value of the additional services rendered to said depositing stockholders by said Marion, Berkman and Leiman, and to charge the amount thereof to said stockholders." The accompanying opinion of the court states that it "has had no difficulty in determining that the claimants rendered services to the preferred stockholders named in the escrow agreement which were not compensable from the fund distributed by order of the court" and "That such services to the Preferred Stockholders Committee at the request of its members, are entitled to a reasonable recompense seems unquestionable if the escrow agreement is to be reasonably interpreted." The opinion indicates clearly that the court up-[fol. 38] held the contention that the allowances made by it were only for compensable services, i. e., those payable out of the debtor's estate, and that the claimants, two of whom are the present plaintiffs, were entitled to additional compensation for non-compensable services from those who retained them, but that the determination of the claim for such non-compensable services was beyond the jurisdiction of the Federal Court in which the reorganization proceeding was pending.

To uphold the contention of the present movants that the federal court was in error and that this court has no jurisdiction of the subject matter of the action would be tantamount to a ruling that although the plaintiffs have a good claim neither the federal court nor this court has jurisdiction. The defendants proper remedy, it would seem, was to appeal from the order of the federal court to the extent that it provided (1) that the allowances therein granted to Marion, Berkman and Lehman were without prejudice to their rights under the escrow agreement to receive additional compensation from the preferred stockholders, and (2) that it was without jurisdiction to pass upon said rights.

The motion for judgment dismissing the amended complaint is denied, with leave to answer within ten days from the service of a copy of this order, with notice of entry. Order signed.

[fols. 39-40] In the Supreme Court of New York, County of New York

Stipulation Waiving Certification

It is hereby stipulated, pursuant to Section 170 of the Civil Practice Act, that the foregoing consists of true and correct copies of the notice of appeal, the order appealed from, the opinion and all the papers upon which the Court below acted in making said order, and the whole thereof, now on file in the office of the Clerk of the County of New York, and certification thereof pursuant to Section 616 of the Civil Practice Act or otherwise is hereby waived.

Dated the — day of May, 1947.

Leo Praeger, Attorney for Defendants-Appellants.

Morris Berkeley, Attorney for Plaintiffs-Respondents.

[fol. 41] SUPREME COURT, NEW YORK COUNTY

NATHAN D. LEIMAN and SAMUEL MARION, Plaintiffs-Respondents,

against

ALEXANDER GUTTMAN, GEORGE GELLER and ARTHUR BAINTON, Individually and as officers and members of the Committee of Preferred Stockholders of Pittsburgh Terminal Coal Corporation; Howard S. Guttman, Monroe Guttman, Rudolph Guttman, Irene Guttman and Elizabeth Wolfers, Defendants-Appellants,

and

ALLEN H. BERKMAN, Defendant

NOTICE OF APPEAL TO THE COURT OF APPEALS—July 21, 1947

SIR:

Please take notice that, pursuant to an order of the Appellate Division, Supreme Court, First Judicial Department, entered in the office of the Clerk of said Appellate Division on the 3rd day of July, 1947, granting defendants-appellants' application for leave to appeal from the Appellate Division to the Court of Appeals, and certifying a certain question to be reviewed by the Court of Appeals, the above named defendants-appellants hereby appeal to the Court of Appeals, from the order of the Appellate Division, First Department, entered in the office of the Clerk of the said Appellate Division, First Department, on the 3rd day of July, 1947, affirming by a divided Court an order of the [fol. 42] Supreme Court entered herein in the office of the Clerk of New York County on the 7th day of April, 1947, which order denied defendants-appellants' motion to dismiss the amended complaint herein, on the ground that this Court has no jurisdiction of the subject matter of the action, and the defendants-appellants hereby appeal from each and every part of said order of affirmance as well as from the whole thereof, and for the review of the following certified question:

"Has the Supreme Court of the State of New York jurisdiction over the subject matter of this action to recover for legal services rendered to the stockholders

committee which are not compensable out of the assets of the Debtor's estate, in a Chapter X reorganization proceeding under the United States Bankruptcy Act?"

Dated New York, July 21, 1947.

Yours, etc., Leo Praeger, Attorney for Defendants-Appellants. Office & P. O. Address, 401 Broadway, Borough of Manhattan, City of New York.

To Clerk of New York County.

To Morris [redacted], Esq., Attorney for Plaintiffs-Respondents, Office & P. O. Address, 291 Broadway, Borough of Manhattan, City of New York.

[fol. 43] IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

NATHAN D. LEIMAN AND SAMUEL MARION,
Plaintiffs-Respondents,

against

ALEXANDER GUTTMAN, GEORGE GELLER AND ARTHUR BAINTON, Individually and as Officers and Members of the Committee of Preferred Stockholders of Pittsburgh Terminal Coal Corporation; Howard S. Guttman, Monroe Guttman, Rudolph Guttman, Irene Guttman and Elizabeth Wolfers, Defendants-Appellants, and Allen H. Berkman, Defendant.

ORDER OF APPELLATE DIVISION GRANTING LEAVE TO APPEAL TO THE COURT OF APPEALS—July 3, 1947

The above named defendants-appellants having moved for leave to appeal to the Court of Appeals from the order [fol. 44] of this Court entered herein on the 24th day of June 1947,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Leo Praeger, in support of said motion, and the affidavit of Samuel Marion in opposition thereto, and after hearing Mr. Leo Praeger for the motion, and Mr. Samuel Marion opposed, it is hereby

Ordered that the said motion be and the same hereby is granted and this Court hereby certifies that in its opinion

a question of law is involved which ought to be reviewed by the Court of Appeals as follows:

"Has the Supreme Court of the State of New York jurisdiction over the subject matter of this action to recover for legal services rendered to the stockholders committee which are not compensable out of the assets of the Debtor's estate, in a Chapter X reorganization proceeding under the United States Bankruptcy Act?"

Enter.

J. M. C. Justice.

[fol. 45] IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

NATHAN D. LEIMAN, et ano., Plaintiffs-Respondents,

against

ALEXANDER GUTTMAN, et al., Defendants-Appellants.

ORDER OF AFFIRMANCE OF APPELLATE DIVISION, APPEALED FROM—June 24, 1947

An appeal having been taken to this Court by the above-named defendants from an order of the Supreme Court, New York County, entered on the 7th day of April 1947, denying said defendants' motion pursuant to Rule 107, subdivision 2, of the Rules of Civil Practice, to dismiss the amended complaint herein, on the ground that the Court has no jurisdiction of the subject matter of the action, and said appeal having been argued by Mr. Leo Praeger of counsel for the appellants, and by Mr. Samuel Marion of counsel [fol. 46] for the respondents, and due deliberation having been had thereon, it is hereby

Ordered that the order so appealed from be and the same is hereby affirmed with $20 costs and disbursements to the respondents, with leave to the defendants-appellants to answer within ten days after service of a copy of this order with notice of entry thereof, on payment of said costs. (Two of the Justices dissent and vote to reverse and grant the motion to dismiss.

Enter.

D.W.P.

[fol. 47] IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

AFFIDAVIT OF NO OPINION BY APPELLATE DIVISION—September 8, 1947

STATE OF NEW YORK,
County of New York, ss:

Leo Praeger, being duly sworn, deposes and says that he is the attorney for the Defendants-Appellants herein; that he is familiar with all the proceedings had in this action; and that no opinion or memorandum has been rendered by the Court below in this case.

Leo Praeger.

Sworn to before me this 8th day of Sept., 1947. Barney Rosenstein, Attorney & Counsellor-at-Law in the State of New York, Residing in Bronx County. P.O. Address: 401 Broadway, N. Y. 13, N.Y. Bronx Co. Clk's No. 15, Reg. No. A-321-R-9. Certificates Filed in: N. Y. Co. Clk's No. 1083, Reg. No. A-1003-R-9. Commission Expires March 30, 1949.

[fol. 48] IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION—Sept. 30, 1947

It is hereby stipulated, pursuant to Section 170 of the Civil Practice Act, that the foregoing consists of true and correct copies of the notice of appeal to the Court of Appeals, the order of Appellate Division granting leave to appeal to the Court of Appeals, the order of affirmance of Appellate Division appealed from and all the papers upon which the Court below acted in making said order, and the whole thereof, now on file in the office of the Clerk of the County of New York; and certification thereof pursuant to Section 616 of the Civil Practice Act or otherwise is hereby waived.

Dated the 30 day of September, 1947.

Leo Praeger, Attorney for Defendants-Appellants.
Morris Berkeley, Attorney for Plaintiffs-Respondents.

[fol. 49] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 50] Reporter's Certificate to following paper omitted in printing.

[fol. 51] IN THE COURT OF APPEALS OF NEW YORK

NATHAN D. LEIMAN et al., Respondents, v. ALEXANDER GUTTMAN et al., Individually and as Officers and Members of the Committee of Preferred Stockholders of Pittsburgh Terminal Coal Corporation et al., Appellants, et al., Defendants.

Decided March 11, 1948

Appeal, by permission of the Appellate Division of the Supreme Court in the first judicial department upon a certified question from an order of said court, entered July 3, 1947, which affirmed an order of the Supreme Court at Special Term (Valente, J.), entered in New York County, denying a motion by defendants for a dismissal of the amended complaint upon the ground that the court did not have jurisdiction of the subject matter of the action.

Barney Rosenstein and Leo Praeger for appellants.

George Zolotar, Samuel M. Koenigsberg, Arthur A. Burck, Aaron Levy, Roger S. Foster and Sidney H. Willner for Securities and Exchange Commission, amicus curiae, in support of appellants' position.

Samuel Marion and Morris Berkeley for respondents.

Opinion

Thacher, J. Appeal by permission of the Appellate Division, First Department, upon a certified question from an order of said court which affirmed an order of the Supreme Court at Special Term denying defendants' motion to dismiss the amended complaint on the ground that the court has not jurisdiction of the subject matter of the action. The following question was certified: "Has the Supreme Court of the State of New York jurisdiction over the subject-matter of this action to recover for legal services rendered to the stockholders committee which are not compensable out of the

assets of the Debtor's estate, in a Chapter X reorganization proceeding under the United States Bankruptcy Act?"

The complaint alleges that plaintiffs were retained by the defendants-appellants, who were officers and members of a committee of preferred stockholders of Pittsburgh Terminal Coal Corporation in corporate reorganization proceedings pending in the United States District Court for the Western District of Pennsylvania, In the Matter of Pittsburgh Terminal Coal Corporation, Debtor, to file amended proofs of claim against the debtor for money alleged to be due on preferred stock certificates under the sinking fund provisions relating thereto and to render other services in connection with the reorganization proceedings, for which defendants agreed to pay plaintiffs for their fee and disbursements therein, in addition to any sum allowed by the court, 20% of the stockholdings of the defendants. Stock certificates were to be deposited with the chairman of the committee and delivered to plaintiffs upon the completion of the pro-
[fol. 52] ceedings. It is further alleged that the proceedings in reorganization have been substantially completed, but the defendants-appellants have failed and refused to turn over the shares of preferred stock thus deposited in escrow. Attached to the complaint as Exhibit A is a copy of a letter from the committee advising the plaintiffs of the deposit of the shares with them by four of the preferred stockholders. The document, referring to the shares, states the terms upon which they are held as follows: "They have been obtained and are held in escrow on the condition that they be delivered to you only at such time as the reorganization proceedings in the matter of Pittsburgh Terminal Coal Corporation are finally terminated and a final settlement of all suits and claims made by this Committee in behalf of the preferred stockholders have been settled. It is further conditioned upon faithful and satisfactory performance of your duties as counsel to this Committee until the termination of all proceedings."

There is no allegation in the complaint disclosing the actual services rendered. It does, however, appear that the compensation sought is "in addition to any sum allowed by the court", is "additional compensation for your services in the above matter" and "conditioned upon faithful and satisfactory performance of your duties as counsel to this Committee until the termination of all proceedings." There

is no allegation of performance, but it is alleged "that all proceedings in said reorganization have been substantially completed". Thus it is clear that the claim asserted is for additional compensation for services as counsel to the stockholders' committee. According to the document, counsel are to have the shares as additional compensation, regardless of the value or character of the services rendered.

Jurisdiction of the courts of the United States in all matters and proceedings in bankruptcy is exclusive of the courts of the several States (U. S. Const., art. I, § 8; U. S. Code, tit. 28, § 371, par. [Sixth]). Sections 221, 241, 242 and 243 of the Federal Bankruptcy Act (U. S. Code, tit. 11, §§ 621, 641, 642, 643) impose upon the Federal courts the duty of allowing reimbursement for proper costs and expenses incurred and reasonable compensation for services rendered in corporate reorganization proceedings, and under these provisions the bankruptcy courts have plenary power to review all fees and expenses in connection with the reorganization from whatever source they may be payable (*Woods v. City Nat. Bank & Trust Co.*, 312 U. S. 262, 267). Section 221, having general application in reorganization, provides: "The judge shall confirm a plan if satisfied that—* * * (4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the [fol. 53] plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge". There has been no such scrutiny by the bankruptcy court in this case. Section 241 deals with costs and expenses incurred by the petitioning creditors and reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by referees, special masters, the trustee and other officers, and the attorneys for any of them, the attorney for the debtor and the attorney for the petitioning creditors. Section 242 governs this case; it provides: "The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved

by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—

"(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders; * * *

"(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission."

We think it entirely clear that it was the duty of the bankruptcy court to determine and allow reasonable compensation for the services rendered by plaintiffs as attorneys for the committee of stockholders and to determine, as required by section 221, whether or not the additional compensation promised to be paid to plaintiffs by delivery of shares was reasonable (*Brown* v. *Gerdes*, 321 U. S. 178; *Woods* v. *City Nat. Bank & Trust Co., supra*). This jurisdiction being exclusive, the State courts have no jurisdiction to entertain any suit for compensation in addition to the compensation allowed by the bankruptcy court.

The judge in the bankruptcy court made an order to the effect that an allowance of $37,500, previously granted by his order to plaintiffs and defendant Berkman, who with the approval of the defendants had been retained as counsel, as compensation for legal services, was "without prejudice to such rights as said Marion, Berkman and Leiman may have" in the escrow agreement. (Matter of Pittsburgh Terminal Coal Corp., 69 F. Supp. 656, 659.) It seems clear that the district judge misapprehended the duty imposed upon him by section 221 of the act, which required his determination that all payments made or promised by any person for services or for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization have been fully disclosed and are reason-
[fol. 54] able, or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge.

It is our view, therefore, that the Supreme Court of this State is without jurisdiction to entertain this suit for additional compensation for services rendered to the committee.

The orders should be reversed and the motion granted, with costs in all courts. The question certified should be answered in the negative.

Desmond, J. (dissenting). The complaint in this equity suit contains, after the allegations summarized in Judge

Thacher's opinion, a prayer or judgment requiring defendants to deliver up to plaintiff the stock in question, and for a determination of the rights of defendant Berkman in said stock, also a prayer "that the plaintiffs have such other, further and different relief against the defendants as may be just and proper". The motion for dismissal was made on the sole ground that the Supreme Court of the State of New York has no jurisdiction at all to entertain this suit or to hear the parties or to grant or deny any relief. The majority opinion for reversal here grounds itself on the sweeping holding that since the legal services rendered by plaintiffs to defendants were in a chapter X reorganization, the State courts are totally without power or authority to furnish any relief, no matter what the precedent circumstances, even the most unusual circumstances here disclosed.

I do not doubt that the Federal bankruptcy courts have plenary power to review all fees and expenses in connection with a reorganization, from whatever sources they may be payable, as the Supreme Court said in *Woods v. City Nat. Bank & Trust Co.* (312 U. S. 262, 267). The plain intent of the statute, for reasons easy to discover (see 1 Collier on Bankruptcy [14th ed.], § 11.09), is that fee arrangements for services in chapter X proceedings, are to have the scrutiny and approval or disapproval of the Federal district courts sitting in bankruptcy. These plaintiffs, doing what they could to comply with the spirit and intent of that statute, made frank and full disclosure to the bankruptcy court of the agreement sued upon here. The district judge examined that contract and, in his opinion of January 22, 1947, made these statements which can be treated as findings of fact (Matter of Pittsburgh Terminal Coal Corp., 69 F. Supp. 656, 657-658):

"The court has had no difficulty in determining that the claimants rendered services to the preferred stockholders named in the escrow agreement which were not compensable from the fund distributed by order of the court. Among such services were those rendered in connection with the [fol. 55] sinking fund claims, Guttman's criticism of the Trustee's sales of machinery and his management of the real estate, his rent collections and the repair of the debtor's houses and other property.

"That such services to the Preferred Stockholders Committee, at the request of its members, are entitled to a reasonable recompense seems unquestionable if the escrow

agreement is to be reasonably interpreted. As to the method of recompense, however, considerable controversy has arisen."

After having made those findings to the effect that extra compensation in some amount was due, and having, inferentially, found that the payment thereof would not be inconsistent with the approved reorganization plan or otherwise illegal, the district judge—mistakenly, it seems—went on to hold (pp. 659-660) that he was "without present jurisdiction to determine the value of the additional services" or to "charge the amount thereof to said stockholders."

Regardless of the Federal judge's erroneous views as to his own powers, the events above related show, I think, that the full purpose of the Federal statute was accomplished, at least under these special circumstances. If we hold that the State courts now have no jurisdiction to grant any relief at all to plaintiffs, on the breach by defendants of the fee agreement on which the Federal judge held that something was due, we are depriving these plaintiffs of their day in court. Since such is not a necessary construction of the Bankruptcy Act provisions, I prefer to hold that the State courts are not totally without jurisdiction.

On a proper trial the State Supreme Court may construe any doubtful terms of the agreement sued on, may pass on any defense of its invalidity on any asserted ground, and any controversy as to the amount due. Assumption by the State court of jurisdiction of the subject matter, to that extent, will not violate the letter or spirit of the Federal law.

The order should be affirmed, with costs and the certified question answered in the affirmative.

Loughran, Ch. J., Lewis and Fuld, JJ., concur with Thacher, J.; Desmond, J. dissents in opinion in which Conway and Dye, JJ., concur.

Orders reversed, etc.

[fol. 56] IN THE COURT OF APPEALS

REMITTITUR—March 12, 1948

[fol. 57] NATHAN D. LEIMAN and ano, Respondents,

vs.

ALEXANDER GUTTMAN & ors. etc., Appellants,

and

ALLEN H. BERKMAN, Defendant

Be it remembered That on the 4th day of October in the year of our Lord one thousand nine hundred and forty-seven, Alexander Guttman & ors. etc., the appellants in this cause came here unto the Court of Appeals by Leo Praeger, their attorney, and filed in said court a notice of appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Nathan D. Leiman and ano, the respondents in said cause, afterwards appeared in the said Court of Appeals by Morris Berkeley, their attorney.

Which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. Barney Rosenstein, of counsel for the appellants, and by Mr. Samuel Marion, of counsel for the respondents, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the orders herein be and the same are hereby reversed and motion granted with costs in all courts. Question certified answered in the negative.

[fol. 58] And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the Appellate Division of the Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said orders be reversed and motion granted with costs in all courts. Question certified answered in the negative as aforesaid.

And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises are by the said Court of Appeals remitted unto the Appellate Division of the Supreme Court, First Judicial Department, before the

justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the justices thereof etc.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 59] In the Appellate Division of the Supreme Court of New York

Nathan D. Leiman and Samuel Marion, Plaintiffs-Respondents,

against

Alexander Guttman, George Geller and Arthur Bainton, individually and as officers and members of the Committee of Preferred Stockholders of Pittsburgh Terminal Coal Corporation; Howard S. Guttman, Monroe Guttman, Rudolph Guttman, Irene Guttman and Elizabeth Wolfers, Defendants-Appellants,

and

Allen H. Berkman, Defendant

Judgment of Remittitur—March 25, 1948

The above named defendants-appellants having appealed to the Court of Appeals of the State of New York from the order of affirmance of the Appellate Division of the Supreme Court, First Judicial Department, made on the 24th day of June 1947, affirming the order in favor of the plaintiff and against the defendant, heretofore entered in the office of the clerk made on April 7, 1947 in the Supreme Court, New York County, denying defendants' motion pursuant to Rule 107, subdivision 2 of the Rules of Civil Practice, to dismiss the amended complaint on the ground that the court [fol. 60] has no jurisdiction of the subject matter of the action, and the Appellate Division, First Department, by order dated July 3, 1947 having certified to the Court of

Appeals a question of law for its determination, and the said appeal having been argued at the said Court of Appeals, and after deliberation the Court of Appeals having ordered and adjudged that the said orders herein be reversed and the motion granted with costs in all courts, and having further ordered that the question certified be answered in the negative, and having further ordered and adjudged that the record aforesaid and the proceedings be remitted to the Appellate Division of the Supreme Court, there to be proceeded upon according to law;

Now on reading and filing the remittitur from the said Court of Appeals herein, and upon motion of Leo Praeger, attorney for the defendants-appellants herein, it is hereby

Ordered that the order and judgment of the said Court of Appeals be and the same hereby are made the order and judgment of this court.

Enter

D. W. P., Justice.

[fol. 61] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

OCTOBER TERM 1948

No. 858

NATHAN D. LEIMAN and SAMUEL MARION,

Petitioners,

against

ALEXANDER GUTTMAN, GEORGE GELLER and ARTHUR BAINTON, individually and as officers and members of the Committee of Preferred Stockholders of Pittsburgh Terminal Coal Corporation, HOWARD S. GUTTMAN, MONROE GUTTMAN, RUDOLPH GUTTMAN, IRENE GUTTMAN and ELIZABETH WOLFERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI

COPAL MINTZ,
Attorney for Petitioners,
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Supreme Court of the United States

OCTOBER TERM 1948

No.

NATHAN D. LEIMAN and SAMUEL MARION,

Petitioners,

against

ALEXANDER GUTTMAN, GEORGE GELLER and ARTHUR BAINTON, individually and as officers and members of the Committee of Preferred Stockholders of Pittsburgh Terminal Coal Corporation, HOWARD S. GUTTMAN, MONROE GUTTMAN, RUDOLPH GUTTMAN, IRENE GUTTMAN and ELIZABETH WOLFERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NATHAN D. LEIMAN and SAMUEL MARION hereby respectfully apply for a writ of certiorari to the Court of Appeals of the State of New York to certify to this Court, for review and determination, its proceedings and final judgment dismissing petitioners' complaint against the above named respondents in the action which the petitioners brought in the Supreme Court of the State of New York, New York County.

The Matter Involved

The petitioners seek the review by this Court of the *4 to 3* decision and final judgment of the Court of Appeals of the State of New York in *Leiman and ano.* v. *Guttman, et al.*, 297 N. Y. 201 (R. pp. 49, *et seq.*) rendered on March 11, 1948.

By that judgment, the highest court of the state, reversing the lower courts, dismissed the petitioners' complaint on the ground, and *solely on the ground*, that under and by reason of Sections 221, 241-243 of the Bankruptcy Act (the provisions for the allowance of reorganization fees and expenses), *sole and exclusive* jurisdiction over the subject matter of the suit is vested in the federal court in which the reorganization proceedings (referred to in the complaint) had been had and that those federal statutory provisions divest the state courts of the jurisdiction which otherwise they would possess and exercise.

The bankruptcy court which the New York Court of Appeals held was endowed with exclusive jurisdiction had held otherwise, after thorough hearing and consideration. Being convinced that the dispute between the present petitioners and respondents were outside the scope of the reorganization proceedings and of the bankruptcy court's jurisdiction, that court had relegated the parties to their normal remedies and forum (*In the Matter of Pittsburgh Terminal Coal Corp.*, 69 Fed. Sup. 656; R. pp. 25-34).*

It was after and pursuant to that decision of the bankruptcy court that the presently dismissed action was brought in the New York Supreme Court.

That action was by lawyers against quondam clients to enforce a contract for their compensation for services rendered to the clients.

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* All page references to the record are to the printed record as filed in the Court of Appeals. The record is being reprinted for this court, and petitioners do not know whether the pages will remain the same.

although rendered in the course of or in connection with proceedings, in the District Court of the United States for the Western District of Pennsylvania, for the reorganization of the Pittsburgh Terminal Coal Corp. under Chapter X of the Bankruptcy Act, *the services for which recovery is sought in the action are only those which were rendered to the respondents personally and did not inure to the benefit of the estate and were not compensable out of the estate,* and for the recovery of which, as already noted, the bankruptcy court, after thorough hearing, expressly relegated the petitioners and their associate to the normal remedy of an action on their contract (*In the Matter of Pittsburgh Terminal Coal Corp., supra;* R. pp. 27-34; see also *infra,* pp. 6-9).

The Special Term of the New York Supreme Court which, in the first instance, heard respondents' motion to dismiss the complaint, held for the petitioners on the question of jurisdiction (*Leiman* v. *Guttman,* 71 N. Y. S. 2d 200; R. pp. 3-4, 37-38). So did the Appellate Division of the Supreme Court, in a 3 to 2 decision, without opinion (*Leiman* v. *Guttman,* 272 App. Div. 896, 72 N. Y. S. 2d 406; R. pp. 45-47). The Court of Appeals, however, reversed the decisions of the lower courts, by a 4 to 3 decision, and dismissed the complaint (*Leiman* v. *Guttman,* 297 N. Y. 201).

The Decisions and Opinions in This Case

As already indicated, the decisions herein are reported and also printed in the record as follows:

The decision of the bankruptcy court, Gibson, D. J., is reported in 69 Fed. Sup. 656 under the title "In re Pittsburgh Terminal Coal Corp." It is printed in the Record at pages 27-34.

The decision and opinion of the Special Term of the New York Supreme Court is reported (unofficially) in 71 N. Y. S. 2d 200. It appears at pages 37-38 of the Record.

The decision of the New York Appellate Division, without opinion, is reported in 272 App. Div. 896, 72 N. Y. S. 2d 406.

The opinion and decision of the Court of Appeals are reported in 297 N. Y. 201 and are printed in the Record at pages 49 *et seq.*

Basis of Jurisdiction

This petition is pursuant to Section 237b of the Judicial Code (Section 344b, Title 28, U. S. C.).

The determination here sought to be reviewed is a final judgment of the highest court of the State of New York that, as already noted, the petitioners are barred from resorting to the State court and that the respondents are immune from such suit and that the State court is ousted of jurisdiction which normally it would have, by reason of and under the Constitution of the United States, to wit, Article I, Section 8, and a statute of the United States, to wit, Sections 221, 241-243 of the Bankruptcy Act (U. S. Code, Title 11, sec. 621, 641-643; 11 U. S. C. A., sec. 621, 641-643).

The Question Herein

As indicated by the above statement of the matter involved and as appears more fully from the facts hereinafter set forth, the question here is:

> Do Sections 221, 241-243 or other provisions of the Bankruptcy Act bar attorneys from suing clients in State courts of general jurisdiction, or in any other court, to enforce a contract, or for *quantum meruit*, for services rendered to clients in the course of a reorganization proceeding under Chapter X of the Bankruptcy Law which are not for the benefit of the estate and are not compensable out of the estate, where (1)

the contract with and claim against the clients and all facts relating thereto have been fully and fairly disclosed to the bankruptcy court, (2) the bankruptcy court, after a thorough hearing, finds that the attorneys rendered services to the clients which are not compensable out of the estate and which should be compensated by the clients but that there are issues as to how and to what extent such compensation should be directed, (3) the bankruptcy court finds that those issues and the determination thereof are not germane to and do not concern and are foreign to the reorganization and the reorganization proceedings and (4) the bankruptcy court makes an award to the attorneys, out of the estate, for such of their services as inured to the benefit of the estate and are properly compensable out of the estate, "without prejudice" to their rights and claims against the clients in respect to the other services which the attorneys rendered to the clients?

The foregoing question divides itself into two parts:

(a) In the circumstances indicated in the question, did the bankruptcy court have jurisdiction to determine the controversy between the attorneys and their clients in respect to the services which were not compensable out of the estate and which would have to result in a personal judgment against the clients?

(b) If the court did have that jurisdiction, was it bound to exercise it? Must it determine all issues which in any way grow out of the reorganization proceedings regardless of whether or not they affect or concern those proceedings, and is the court deprived of the right to determine that (in the circumstances before it) it is more appropriate to have the issues which are personal to the attorneys and the group they represented determined in an ordinary action in a court of competent jurisdiction?

As to the first branch of the question, there are a number of cases in which bankruptcy courts, in reorganization proceedings, deliberately and expressly abstained from concerning themselves with the rights of attorneys to payment by their clients other than the debtor and other than out of property of the debtor (see *infra*, pp. 16-19). Such questions were deemed by the courts foreign to the matters before them. Although there is absent from all but one of them an express statement that the court is without jurisdiction in the premises, that holding is implicit in them. Among such decisions is *Greensfelder v. St. Louis Public Service Company*, 114 F. 2d 53; in which this court, in 1940, *denied a writ of certiorari* (311 U. S. 714).

The only exception to this line of cases is *In Re McCrory Stores Corp.*; 19 Fed. Sup. 917, affirmed 91 F. 2d 947, c. d. 302 U. S. 725, where, in 1937, the court held that a fee contract with an attorney by a committee of creditors in behalf of the creditors whom they represented, as distinguished from a fee agreement between an attorney and a principal, was subject to the court's revisionary jurisdiction (see *infra*, p. 19).

However, whatever may be the correct answer, on the basis of authority, to the first branch of the question, there certainly is no precedent for the holding that the bankruptcy court is bound to finally adjudicate all fee questions between attorneys and the clients for whom they appear in reorganization proceedings, regardless of the facts and circumstances. That is the decisive question here. On that question, *all of the federal decisions are contrary to the decision rendered herein by the New York Court of Appeals.*

The Additional Relevant Facts

Petitioners' complaint was dismissed on motion before answer, in accordance with Rule 107, subdivision 2, of the New York Rules of Civil Practice (R. pp. 4-5).

That rule, in so far as material, provides:

"After the service of the complaint, the defendant may serve notice of motion for judgment dismissing the complaint * * * on the complaint and an affidavit stating facts tending to show:

"* * *

"2. That the court has no jurisdiction of the subject of the action."

By affidavits pro and con, there were presented to the court the applicable rulings and decisions of the United States District Court for the Western District of Pennsylvania. The facts therein set forth were not contested. Those rulings and decisions are part of the record on which the State courts acted (R. pp. 25-34).

The controlling facts, therefore, are those which appear in the undenied complaint as amplified by the referred to decisions.

It appears therefrom that during the pendency of Chapter X proceedings for the reorganization of the Pittsburgh Terminal Coal Corporation, the petitioners were retained by a committee of its preferred stockholders to represent and serve the interests of the preferred stockholders (R. pp. 12-13).

Some of the preferred stockholders (including respondents) asserted claims "for certain moneys alleged to be due on preferred stock certificates under the sinking fund provisions relating thereto". For the assertion and prosecution of their claims "and for other services in connection with the said reorganization proceedings", the respondents agreed to pay to the attorneys "in addition to any sum allowed by the court" 20% of their preferred stock (R. p. 13). In pursuance of that agreement 584 shares of the preferred stock were escrowed with the chairman of the committee for delivery to the attorneys at the conclusion of the reorganization proceedings (R. pp. 13, 15-16).

In the course of the reorganization proceedings, the petitioners and an associate attorney rendered services which were for the benefit of the estate as well as services which were in controversies with the estate and its trustee or were otherwise exclusively beneficial to the stockholder clients without benefit to the estate (R. pp. 29-30).

When a plan of reorganization came up for consideration and confirmation, the petitioners and their associate applied to the bankruptcy court for the fixation and allowance of their fees and expenses. In that application, they made a full and fair disclosure of their contract and called attention to the fact that the respondents had repudiated it on various grounds. Thus the court was presented with a controversy between the attorneys and their clients. The court held hearings thereon. It finally decided that it had no jurisdiction to determine the controversy in so far as it pertained to services which were not compensable out of the estate, and, finding that the fair and reasonable value of the services which these attorneys had rendered for the benefit of the estate, and were compensable out of the estate, amounted to $37,500, the court awarded that out of the estate "without prejudice to such rights" as the attorneys may have under the above referred to agreement in respect to their other services (R. pp. 27-34).

In the course of its decision, the court found that the petitioners'

> "earliest efforts * * * were hostile to and not for the benefit of the trustee's action"

and in other respects the petitioners

> "had rendered services to the preferred stockholders * * * which were not compensable from the fund distributed by order of the court * * *. That such services to the Preferred Stockholders Committee, at the request of its members, are entitled to a reasonable recompense seems unquestionable if the escrow agreement is to be reasonably interpreted" (R. pp. 29-30).

After referring to the various conflicting contentions as to the value of the services and the method of payment therefor, and as to the extent of the court's jurisdiction, the court held that those disputes were not a controversy which it should adjudicate. The court adjudicated all that it thought germane to the reorganization proceedings, and as to all else relegated the parties to their normal remedies (R. pp. 31-34).

Implicit, if not expressed, in the decision of the bankruptcy court is the determination that, in the circumstances of this case, the contract between the parties and the claims thereunder and in respect thereto, in so far as they pertain to services rendered to the individuals and not to (or to the benefit of) the estate, did not affect and did not concern the reorganization and the reorganization proceedings.

Reasons for Granting the Writ

This application comes squarely within subdivision 5a of Rule XXXVIII of the Rules of this Court, as a case where a state court has decided a federal question of substance not heretofore determined by this Court.

That the case presents a federal question is not open to dispute.

That the question has not heretofore been determined by this Court is plain.

Moreover, the decision sought to be reviewed is directly contrary to all of a substantial number of decisions by various of the United States District and Circuit courts (see *infra*, pp. 16-20).

That the question is of substance, it is respectfully submitted, is self-evident. Bankruptcies and reorganizations in bankruptcy courts are a vital function of the federal judicial system. They affect the business world and the community at large. The proper conduct of those proceedings has been and is the concern of the courts, of Congress and administrative agencies. Successive revisions by Con-

gress of the applicable provisions as well as a number of decisions of this Court recognize the importance to those proceedings and to the general welfare of the problem of fees and expenses in or in connection with such proceedings.

The substantial importance of the precise question here presented is indicated by the fact that the Securities Exchange Commission appeared in the New York Court of Appeals as *amicus curiae*. In the brief presented in behalf of the Commission, it was stated:

> "The Commission's interest in submitting a brief in this proceeding as *amicus curiae*, arises from the fact that the issue raised * * * involves a matter of substantial importance in the administration of Chapter X."

The Applicable Statutes and Decisions Thereon

(1) The provisions of the Bankruptcy Act which have a bearing on the questions here presented are Sections 111-116, 209-212, 221, 241-250.

The provisions directly in point will be quoted below.

The significance of the other provisions in the referred to sections is that the "exclusive jurisdiction" with which the court is vested in proceedings under Chapter X is "of the debtor and its property" and nobody else (Section 111), and generally the court's powers are made the same as in bankruptcy proceedings with the addition of the powers which formerly were exercised in equity receiverships (Sections 112-116).

Creditors and stockholders are specifically authorized to "act in person, by an attorney at law, or by a duly authorized agent or committee" (Section 209) and representatives are required to file specified statements (Sections 210-211).

Section 212 reads as follows:

"Sec. 212. The judge may examine and disregard any provision of a deposit agreement, proxy, power or warrant of attorney, trust mortgage, trust indenture, or deed of trust, or committee, or other authorization, by the terms of which an agent, attorney, indenture trustee, or committee purports to represent any creditor or stockholder, may enforce an accounting thereunder, may restrain the exercise of any power which he finds to be unfair or not consistent with public policy and may limit any claim or stock acquired by such person or committee in contemplation or in the course of the proceeding under this chapter to the actual consideration paid therefor."

It will be noted that the above language does not include fee agreements with attorneys-at-law for legal services.

Section 221, as far as material, reads as follows:

"Sec. 221. The judge shall confirm a plan if satisfied that—

* * * *

"(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this Act;

"(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable, or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge."

Sections 241-250 deal with allowances. In respect to allowances to creditors and stockholders and their attorneys, Section 243 provides as follows:

"Sec. 243. The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances, *the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate,* and to the proper costs and expenses incidental thereto." (Emphasis supplied.)

(2) Even if the above quoted Section 212 were applicable —as plainly it is not—to fee agreements with attorneys-at-law for compensation by their clients (as distinguished from the business arrangements with representatives to serve in lay capacities), the section would go no farther than to give the court power to disregard that which, under established legal or equitable principles, is unenforcible. Where the section applies, it applies only to cases of such over-reaching or of oppression or of violation of law or public policy that there should not be an unrevised enforcement of the arrangement.

That section has no application to this cause for the dual reason that (a) it has no application to fee arrangements directly between parties in interest and attorneys-at-law for legal services and (b) the bankruptcy court, in this case, after a thorough hearing, found nothing unfair or criticizable in the agreement between petitioners and respondents and held that the parties should be left to their ordinary remedies. The opinions of New York Court of Appeals make no mention of Section 212.

(3) As to above-quoted Section 243, the bankruptcy court, in this case, complied with it and exhausted it by awarding to the petitioners an amount the court deemed fair for such of their services as were compensable out of the estate. It was only as to the residue of the services that the court relegated the petitioners to their ordinary remedies.

(4) That leaves for consideration only Section 221, and that is the only section of the Bankruptcy Law which the New York Court of Appeals found was violated by the bankruptcy court in abstaining from adjudicating petitioners' claim for the services not compensable out of the estate.

The New York Court of Appeals construed subdivision 4 of that section as mandatorily requiring the bankruptcy court, as a condition precedent to confirming a plan of reorganization, to pass on all payments or promises of payment for all services in any way connected with the reorganization proceeding, irrespective of whether or not such payments or promises in any way affect the reorganization plan or the proceedings.

That, petitioners respectfully submit, is a misconstruction, for the following reasons:

(a) The payments or promises referred to in subdivision 4 of Section 221 are "by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person". "Any other person", thus associated with the words "the debtor * * * or by a corporation * * * under the plan", means, it is submitted, only such persons as are associated with the debtor in the plan. The principle of *ejusdem generis* seems peculiarly applicable.

(b) That is corroborated by the limitation of the section to payments and promises "for services * * * in, or in

connection with the proceeding or in connection with the plan and incident to the reorganization." That language encompasses only payments or promises which in some way affect the reorganization, such as (a) payments or promises for services to the estate, (b) payments or promises which condition or affect the plan of reorganization, (c) payments made or to be made out of the estate or by the reorganized corporation or out of assets destined to or which otherwise would reach the debtor or its creditors.

Therefore, the description of the payments or promises as well as the enumeration of the payers or promisors exclude from the scope of the section payments or promises which have no bearing on the reorganization and have not affected it and will not in any way affect it.

(c) That conclusion, petitioners believe, is further supported by the requirement that if any payment or promise is not reasonable, the plan shall not be confirmed. That is the prescribed consequence; no alternative or other corrective course is provided in that section. It does not authorize the court to direct the elimination or reduction of the objectionable payments or promises. It directs the court to reject the plan. Certainly, it could not be the intention of Congress to defeat a desirable and beneficent plan because of a payment or promise which does not enter into it and is wholly extraneous to it.

Moreover, the refusal to approve a plan because of the unreasonableness of payments or promises which are not dependent upon allowance by the court can serve as a corrective pressure, and be operative as such, only on those whose interests require the approval of a proposed plan. The choice of that method of control also indicates the limitation of the intended scope of the supervision and control to the payments and promises which enter into, condition or affect the reorganization.

(d) That there is such a limitation appears from still another consideration: What of fees to attorneys who de-

fend litigation brought by the trustee or who constitute and conduct proceedings against the trustee or who advise persons with whom the trustee contracts while carrying on the business of the debtor? We assume it readily will be granted that although all of those services arise out of and are connected with the reorganization proceedings, the bankruptcy court is not concerned and cannot concern itself with them because such payments do not impair the *res* which the court is administering. Why does not the same hold true in respect to other services which the court finds were rendered not for the benefit of the estate and the compensation for which is of no interest to the reorganization or of no concern to the court? Apposite here is the holding in *In re P-R Holding Corp.*, 147 F. 2d 895 (C. C. A., 2nd C., 1945), that Section 221 (4) "obviously was not intended to require (the disclosure to) and the approval by the court of matters like the commissions paid a broker for the purchase of creditors' certificates" by the proponents of a plan in order to eliminate opposition thereto.

(5) This argument does not necessarily equally limit the scope of the required disclosure, for it is for the court (and not the interested persons) to decide what does and what does not affect the reorganization. The contention here is only that where the court, after full disclosure and consideration, decides that certain payments or promises or claims do not affect or concern the reorganization or the court, Section 221(4) of the Bankruptcy Act does not empower, much less compel, the bankruptcy court to render final judgment between the interested parties.

(6) Petitioners submit that Gibson, D. J., in refusing to adjudicate the controversy between them and the respondents, correctly construed the statute when he held that "undoubtedly" the court is required to scrutinize all payments and promises to determine "whether they tend to vitiate the plan", and where it finds otherwise and the

payment is not to be made out of the estate its authority ends. "Nowhere" in the statute, said the court, is it provided that an order shall be made requiring payment of amounts which "cannot be charged to the fund for distribution" (R. p. 31).

> "If one had promised compensation to his counsel for his services in a reorganization, but his counsel has not aided in the proceeding, Section 221-(4), in the opinion of the court, furnishes no authority for an order, upon the promisor to pay the counsel the amount promised or what, in the opinion of the court, is the reasonable value of his services. The existence and scope of the promise creates an issue not before the court" (R. pp. 31-32; *Matter of Pittsburgh Terminal Coal Corp., supra*, 69 Fed. Sup. 656, 659-660).

That conclusion is supported by

> *Greensfelder* v. *St. Louis Public Service Company*, 114 F. 2d 53, 59-60, 62 (claim of Carter), 63-64 (claims of Greensfelder and Stein); C. C. A. 8th C. 1940, c. d. 311 U. S. 714;
>
> *In re Mt. Forest Fur Farms of America, Inc.*, 157 F. 2d 640 (C. C. A., 6th C., 1946);
>
> *In re Standard Gas & Electric Co.*, 106 F. 2d 215, 216 (C. C. A., 3rd C., 1939);
>
> *Zweifel* v. *Trans-State Oil Co.*, 99 F. 2d 650 (C. C. A., 5th C., 1938);
>
> *Re Watco Corporation*, 95 F. 2d 249, 251-2 (C. C. A., 7th C., 1938);
>
> *In re Middlewest Utilities Co.*, 17 F. Sup. 359, 377 (N. D. Ill., 1936).

See also *In re Paramount-Publix Corporation*, 12 F. Sup. 823 (S. D. N. Y., 1935); *London* v. *Snyder*, 163 F. 2d 621 (C. C. A., 8th C., 1947); and *Cooke* v. *Bowersock*, 122 F. 2d 977 (C. C. A., 8th C., 1941) and particularly the next to the last paragraph (at p. 985).

In the *Greenfelder* case (*supra*), the Circuit Court of Appeals for the Eighth Circuit held expressly (at p. 64):

> "In the proceedings for the allowance of the fees, the court was not concerned with the question of the amount of fees which Mr. Greenfelder's client or the noteholders' committee might be obligated to pay him."

And this court denied a petition for a writ of certiorari (311 U. S. 714).

In the *Mt. Forest Fur Farms* case (*supra*), the Circuit Court of Appeals for the Sixth Circuit said:

> "The District Court found that the services of these attorneys did not aid in the general administration of the estate of the debtor corporation; that their services in connection with the formulation of the plan were primarily for the benefit of their special clients; *that they have a lien for their fees on the stock to be distributed to their clients, to which they should resort for their fees* for services rendered. No abuse of discretion on the part of the District Court appears * * *" (at p. 649, emphasis supplied).

The same decision approved a holding of the District Court in respect to the application of another attorney:

> "The District Court found, moreover, that the attorney has a fee arrangement with various parties whom he represents and should look to them * * * for his compensation" (at p. 650).

Similarly, *In re Paramount-Publix Corporation* (*supra*), the court said (at p. 836) of an attorney whose services resulted in no contribution to the estate "he should look to his own clients for his compensation for his services in connection with the various court proceedings".

(7) We can find nothing on this point, much less anything contra, in either *Wood* v. *City National Bank and Trust Company*, 312 U. S. 262, or *Brown* v. *Gerdes*, 321 U. S. 178, the two and only two cases cited by the New York Court of Appeals.

The first of these cases was concerned with the problem of whether compensation out of the estate should be denied for services admittedly compensable out of the estate because the persons who rendered them were guilty of dual conflicting representation. In passing on that point, this Court referred to and quoted Section 221(4) of the Bankruptcy Act and remarked:

> "Under Chapter X of the Chandler Act, the bankruptcy court has plenary power to review all fees and expenses in connection with the reorganization from whatever source they may be payable. Reasonable compensation for services rendered may be allowed."

That case presented only a question of payment out of the estate. The problem here involved was not considered; that is, the problem of under what circumstances the bankruptcy court may or must pass on fees payable from sources other than the estate, whether such power exists in respect to payments which have no effect on the reorganization, and whether such power is not only "to review" them but also to interdict them or enter judgment for their payment personally against such persons as may be liable therefor. The remark above quoted throws no light on those questions.

In *Brown* v. *Gerdes*, *supra*, the issue also was limited to a fee payable out of the estate. Moreover, in that case, the parties seeking compensation applied therefor to the state court not after being relegated thereto by the bankruptcy court but in antagonism to that court and in an effort to avoid it.

(8) With the single exception of *In Re McCrory Stores Corp.*, 19 Fed. Sup. 247 (S. D. N. Y. 1936), aff'd 91 F. 2d 947 (C. C. A., 2nd C., 1937), c. d. 302 U. S. 725, there appears to be no case in which the bankruptcy court undertook to adjudicate the fee rights of attorneys against the persons they served under contracts providing for compensation for services not compensable out of the estate. In the *McCrory* case, the court drew a distinction between a fee arrangement between principals and their attorneys and a fee agreement between a committee in behalf of the principals they represented and an attorney, and held that the latter type of agreement, dependent upon a power conferred on the committee by the persons it represented, and as an act of a committee, was subject to scrutiny and revision under the predecessor of present Section 212. The court, apparently, was satisfied that a fee arrangement for legal services directly between a party in interest and his attorney is of no concern to the bankruptcy court.

That decision is no precedent here because: (1) The agreement in this case is directly with the stockholders who escrowed their stock for delivery to the petitioners (and their associate) in payment of their fee (R. pp. 13, 15-16). (2) In the *McCrory* case, the attorneys' fee was a lien on money payable by the estate to the creditors who were represented by the employing committee; thus there was a lien on a *res* in the custody of the court, and the court held that the duty to distribute that *res* properly made it appropriate that it adjudicate the claimed lien, whereas here the escrowed stock is not part of the *res* administered by the court and the court was convinced that the disposition of the stock was not a reorganization issue. (3) While the court held that it was empowered to adjudicate the amount to be paid to the attorney, it did not hold that it was mandatorily required to do so and had no discretion to do otherwise, no matter what were the facts and circumstances.

The foregoing analysis of the decisions shows that this Court has not held, and no other federal court has held, that the bankruptcy court was under a statutory compulsion to finally adjudicate the disputes and issues between the petitioners and the respondents and that no other court is competent to do so despite the holding by the bankruptcy court that the issue was of no concern to the reorganization proceedings. On the contrary, the disposition which the bankruptcy court made was in accordance with the practice that has been consistently followed (with but a single exception) in the substantial number of cases in which the problem arose.

Prayer

Wherefore, petitioners respectfully pray that this petition for a writ of certiorari to review the complained of judgment be granted.

Dated, New York, June 9, 1948.

NATHAN D. LEIMAN
SAMUEL MARION

By COPAL MINTZ,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 88.

NATHAN D. GUTMAN and SAMUEL MARION,
Petitioners,

against

ALEXANDER GUTTMAN, GEORGE GELLER and ARTHUR BAINTON, Etc., et al.
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONERS.

SAMUEL MARION,
Attorney for Petitioners.

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Argued by
SAMUEL MARION.

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OCTOBER TERM, 1948.

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NATHAN D. LEIMAN and SAMUEL MARION,
Petitioners,

—against—

ALEXANDER GUTTMAN, GEORGE GELLER and ARTHUR BAINTON, Etc., et al.
Respondents.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The opinion of the bankruptcy court, Gibson, D. J., is reported in 69 Fed. Sup. 656 under the title "*In re Pittsburgh Terminal Coal Corp.*" It is printed in the Record at pages 18-23.

The opinion of the Special Term of the New York Supreme Court is reported (unofficially) in 71 N. Y. S. 2d 200. It appears at pages 25-26 of the Record.

The decision of the New York Appellate Division, without opinion, is reported in 272 App. Div. 896, 72 N. Y. S. (2d) 406. (R. p. 29).

The opinion of the Court of Appeals is reported in 297 N. Y. 201 and is printed in the Record at pages 31-36.

GROUNDS OF JURISDICTION.

The judgment of the Court of Appeals of the State of New York dismissing the complaint on the ground that the New York Supreme Court had no jurisdiction, and that jurisdiction of the cause of action involving a claim for legal services rendered in connection with a Chapter X Reorganization Proceeding was vested solely in the bankruptcy court (R. pp. 31-39) comes before this Court on a Writ of Certiorari granted October 11, 1948. The jurisdiction of this Court was invoked under Section 237b of the Judicial Code, Title 28 U. S. C., Section 344b.

QUESTION PRESENTED.

Do Sections 221, 241, 242 and 243, 11 U. S. C. § 621, 641-643, or other provisions of the Bankruptcy Act, bar attorneys from suing clients in State courts of general jurisdiction, or in any other court, to enforce a contract, or for quantum meruit, for services rendered to clients in the course of a reorganization proceeding under Chapter X of the Bankruptcy Law which are not for the benefit of the estate and are not chargeable to the Debtor's Estate where

(1) the contract with and claim against the clients and all facts relating thereto have been fully and fairly disclosed to the bankruptcy court,

(2) the bankruptcy court, after a thorough hearing, finds that the attorneys rendered services to the clients which are not compensable out of the estate and which should be paid for by the clients, but questions are raised as to the amount and manner of payment,

(3) the bankruptcy court finds that those issues and the determination thereof are not germane to, do not concern and are foreign to the reorganization plan previously approved and to the reorganization proceedings, and

(4) the bankruptcy court makes an award to the attorneys, out of the estate, for such of their services as inured to the benefit of the estate and are properly compensable out of the estate, without prejudice to the rights petitioners may have against the clients in respect to the other services which the attorneys rendered to the clients, not compensable out of the Debtor's Estate?

The foregoing question divides itself into two parts:

(a) In the circumstances indicated in the question, does the bankruptcy court have jurisdiction to determine the controversy between the attorneys and their clients in respect to the services which were not chargeable to the Debtor's Estate; if it has such jurisdiction, can it enforce its decision by entering a personal judgment against the clients?

(b) If the court does have that jurisdiction, was it bound to exercise it, and determine all issues which in any way arise out of the reorganization proceedings, regardless of whether or not they affect or concern those proceedings or a plan of reorganization? Is the court deprived of the right to determine that (in the circumstances before it) it is more appropriate to have the issues (personal to the attorneys and their clients), determined in an action in a court of competent jurisdiction?

STATEMENT OF THE CASE.

During the pendency of Chapter X proceedings for the reorganization of Pittsburgh Terminal Coal Corp., petitioners were retained by a preferred stockholders' committee to represent the interests of the preferred stockholders.

Some of the preferred stockholders (including respondents),* asserted claims for certain moneys alleged to be due on preferred stock certificates under the sinking fund provisions relating thereto. For the assertion and prosecution of their claims "and for other services in connection with the said reorganization proceedings", the respondents agreed to pay to the attorneys "in addition to any sum allowed by the court" 20% of their preferred stock. In pursuance of that agreement 584 shares of the preferred stock of the Debtor were escrowed with the chairman of the committee by the respondents, for delivery to the attorneys at the conclusion of the reorganization proceedings.**

In the course of the reorganization proceedings, the petitioners and an associate attorney rendered services which were for the benefit of the estate, as well as services which were in controversies with the estate and its trustee or were otherwise exclusively beneficial to the stockholder clients, without benefit to the estate (R. pp. 12, 14).

When a plan of reorganization came up for consideration and confirmation, the petitioners and their associate applied to the bankruptcy court for the fixation and allowance of their fees and expenses. In that application, they made full disclosure of their contract and called attention to the fact that the respondents had repudiated it.

The Securities and Exchange Commission at the hearing on said application recommended to the Court

> "that for the compensable services, that is for the services for which the Court has the power to com-

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* The fee agreement did not affect all preferred stockholders who authorized the Committee to act, but only respondents.

** The quotations are from the Complaint, R. pp. 8-9. The agreement annexed to the Complaint was prepared by the respondents.

pensate them, the services which were of benefit to the estate, we recommend a final allowance to these attorneys for the preferred stockholders' committee in the sum of $40,000. * * * " (R. p. 12)

The District Judge fixed the allowance to petitioners at $37,500. Subsequently, the District Judge held a full hearing "as to the scope of the deposit" of the stock referred to in the complaint as additional compensation to petitioners (R. p. 13). At that hearing, the S. E. C. submitted a memorandum which stated, at page 31,

> "In our opinion, the reasonable value of all claimants' services is $70,000. This figure covers both services compensable out of the estate and those not so compensable."

After referring to the various conflicting contentions as to the value of the services and the method of payment therefor, and as to the extent of the court's jurisdiction, the court held that those disputes were not a controversy which it should adjudicate. The court adjudicated all that it thought germane to the reorganization proceedings, and as to all other matters relegated the parties to their normal remedies (R. pp. 18-23).

In its opinion, the District Court found that petitioners had rendered services to the preferred stockholders which were not chargeable to the Debtor's Estate; that for said services petitioners were entitled to a reasonable recompense; that the District Court did not have jurisdiction to determine the claim against the depositing stockholders and to make the allowance a direct charge against the depositing stockholders; "that the existence and scope of the promise creates an issue not before the court"; and entered an order that the allowance made to petitioners was without prejudice to such rights as petitioners had under the agreement annexed to the complaint. (*In the Matter of Pittsburgh Terminal Coal Corp.*, 69 Fed. Sup. 656; R. pp. 17-23.)

An appeal from said order was taken to the Circuit Court of Appeals, Third Circuit, by the respondents. Said appeal was dismissed by order of the C. C. A. dated June 25, 1947.

An action was thereafter commenced in the New York Supreme Court to recover for the services for which the Debtor could not be charged and to recover the stock deposited in escrow as compensation for said services, and for other relief [1] (Complaint, R. pp. 8-11). Respondents moved to dismiss the complaint on the sole ground that the Court had no jurisdiction of the subject matter of the action; that such jurisdiction is vested solely in the bankruptcy court.[2] The motion was denied at Special Term;[3] the Appellate Division of the New York Supreme Court affirmed;[4] but the Court of Appeals, by a four to three decision, reversed [5] and dismissed the complaint on the sole ground that under the Bankruptcy Act, the State court lacked jurisdiction and that jurisdiction of this controversy was vested solely in the bankruptcy court. In its opinion, the Court of Appeals ruled

> "that the district judge misapprehended the duty imposed upon him by Section 221 of the (Bankruptcy) act." (R. p. 34)

THE ISSUES RAISED.

Jurisdiction of this suit by the New York Supreme Court depends on whether the Bankruptcy Act grants exclusive ju-

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[1] The respondents reside in New York and the stock certificates involved in this action are in New York.

[2] This motion was made under Rule 107, subdivision 2 of the New York Rules of Civil Practice (R. p. 3) which provides:

> "After the service of the complaint, the defendant may serve notice of motion for judgment dismissing the complaint * * * on the complaint and an affidavit stating facts tending to show:
> "* * *
> "2. That the court has no jurisdiction of the subject of the action."

[3] It is not clear from the opinion of the Special Term whether the decision denying the motion rested on deference to the views of the bankruptcy court as to its own lack of jurisdiction or upon the conclusion that the bankruptcy court's determination was res adjudicata. Although this point was argued in the Court of Appeals, that Court did not pass on it.

[4] 272 App. Div. 806.

[5] 297 N. Y. 201

risdiction to the district court over a fee agreement between attorneys and clients for services rendered in connection with a Chapter X Reorganization Proceeding, where the services are not beneficial to the debtor, are not chargeable to the debtor's estate, and where after disclosure and a full hearing, the district court finds that the attorneys are entitled to compensation and declines jurisdiction to determine the value of such services.

May the district court consent to the adjudication of those rights in another forum?

The nature of this suit is not in dispute. No bankruptcy controversy is involved. No reorganization problem is presented. No property of the debtor or under the control or possession of the court is in litigation. Cf. *Mueller* v. *Nugent* (1901), 184 U. S. 1, 14-15.

THE APPLICABLE PROVISIONS OF THE BANKRUPTCY ACT.

Chapter X, by its terms, excludes from its scope controversy such as this. Section 101, 11 U. S. C. § 501, states:

> "The provisions of this chapter shall apply *exclusively* to proceedings *under* this chapter." (Italics supplied)

Section 111, Bankruptcy Act, 11 U. S. C. § 511, provides that the bankruptcy court has "exclusive jurisdiction of the debtor and its property". The claim, which is the subject of this litigation, does not affect the debtor, its property, or the plan of reorganization approved by the Court.

Generally the court's powers in Chapter X Proceedings are the same as in bankruptcy proceedings, with the addition of the powers which formerly were exercised in equity receiverships (Sections 112-116, 11 U. S. C. §§ 512-516).

Creditors and stockholders are specifically authorized to "act in person, by an attorney at law, or by a duly authorized agent or committee" (Sec. 209, 11 U. S. C. § 609) and representatives are required to file specified statements (Secs. 210-211, 11 U. S. C. §§ 610-611).

Section 212, 11 U. S. C. §612, reads as follows:

> "The judge may examine and disregard any provision of a deposit agreement, proxy, power or warrant of attorney, trust mortgage, trust indenture, or deed of trust, or committee, or other authorization, by the terms of which an agent, attorney, indenture trustee, or committee purports to represent any creditor or stockholder, may enforce an accounting thereunder, may restrain the exercise of any power which he finds to be unfair or not consistent with public policy and may limit any claim or stock acquired by such person or committee in contemplation or in the course of the proceeding under this chapter to the actual consideration paid therefor."

This language does not include fee agreements with attorneys-at-law for legal services. The language of this section is permissive and not mandatory. This section applies only to cases of such over-reaching, oppression, or a violation of law or public policy as requires the intervention of the court. Even regardless of this section, the courts would have inherent power of control of the attorneys practicing before it.

Assuming, however, that this section empowered the District Court to pass on the agreement in suit, before the Court could interfere with the agreement between the parties, it would be obliged to find the agreement "to be unfair or not consistent with public policy". The Court made no such finding. On the contrary, it found that petitioners rendered services to the respondents which were not compensable from the fund distributed by order of the Court; and that such services "are entitled to a reasonable recompense" (R. p. 20).

Section 212, Bankruptcy Act, 11 U. S. C., § 512 grants permissive power to modify any agreement which the judge finds to be "unfair or not consistent with public policy". Disregarding the question whether this section covers a private fee agreement between attorney and client, the fact is that the judge, after a full hearing, made no finding that the agreement in suit is "unfair or not consistent with public

policy", but did find that petitioners are unquestionably entitled to compensation for the services rendered to respondents which were not chargeable to the Debtor's Estate (R. p. 20).

Section 221 (4), Bankruptcy Act, 11 U. S. C., § 621 (4) deals with the confirmation of a plan of reorganization. It provides:

> "Sec. 221. The judge shall confirm a plan if satisfied that——
>
> * * * *
>
> "(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this Act;
>
> "(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other persons, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable, or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge." [6]

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[6] In a decision dated September 12, 1947, the District Judge said:

"The court investigated all promises of payments which might affect the plan of reorganization prior to its approval. Having done so it approved the plan. In due time it fixed the compensation of counsel concerned, among them Messrs. Marion, Berkman and Leiman, and ordered the Trustee to pay them for the benefits which resulted from their services to the reorganization. It did not, and could not, order the Preferred Shareholders to pay to their counsel an amount to cover non-compensable services rendered to the shareholders.

"It is urged on behalf of the former appellants that litigation in a state court on the claim for additional compensation might result in an award to claimants that would include an amount which had already been included in the order of this court granting the compensable allowance. As to this allegation it must be kept in mind that the burden will be upon plaintiffs to distinguish between compensable services already allowed, and non-compensable services, and it is not to be assumed by this court that the hearing court will make an erroneous finding."

Sections 241-250, Bankruptcy Act, 11 U. S. C. §§ 641-650, deal with allowances. In respect to allowances to creditors and stockholders and their attorneys, Section 243 provides:

> "The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto."

The language of this section is permissive, not mandatory.

The bankruptcy court, in this case, complied with this section, and allowed the petitioners an amount the court deemed fair for such of their services as were compensable out of the estate. It was only as to the residue of the services that the court relegated the petitioners to their ordinary remedies.

SPECIFICATION OF ERRORS.

The Court of Appeals of the State of New York erred:

1. In holding that the jurisdiction over this action was solely vested in the bankruptcy court under Section 221, Bankruptcy Act, 11 U. S. C. § 621.

2. In dismissing the complaint on the sole ground that the New York Supreme Court had no jurisdiction over this action.

POINT 4.

THE BANKRUPTCY ACT DOES NOT DEPRIVE STATE COURTS OF JURISDICTION OF A FEE CLAIM FOR SERVICES RENDERED IN A CHAPTER X PROCEEDING, WHERE THE COMPENSATION IS NOT TO BE CHARGED TO THE DEBTOR AND DOES NOT AFFECT A PLAN.

The New York Court of Appeals, in dismissing the complaint on the sole ground that the jurisdiction of the federal courts of "all matters and proceedings in bankruptcy is exclusive of the courts of the several States" (R. p. 33) held, that "the bankruptcy courts have plenary power to review all fees and expenses in connection with the reorganization from whatever source they may be payable." In its decision, it cited *Woods v. City National Bank & Trust Company*, 312 U. S. 262, 267, and *Brown v. Gerdes*, 321 U. S. 178. Neither of the cases cited deal directly with a case such as this, where the services for which recovery is sought, are not chargeable to the Debtor's Estate, have no bearing on a plan of reorganization, or the reorganization proceedings.

In the *Brown* case, the question involved was

> "Whether the New York court or the Federal bankruptcy court has the power to fix the fees of petitioners who as attorneys represented the bankruptcy estate in litigation in the State courts."

That case differs from the case at bar in that the recovery for services was by the attorneys who had been appointed by the Federal Court, represented the bankruptcy estate and the fees would necessarily be paid out of the bankruptcy estate. The case at bar differs in that services were rendered by an attorney for his client, not for the bankruptcy estate, and the compensation was to be paid not by the bankruptcy estate but by the client. As this Court in its opinion in the *Brown* case stated:

The Court cited (U. S. Const. Art. 1, §8; U. S. Code, tit. 28, §371, par. [sixth]); Sections 221, 241, 242, 243, Bankruptcy Act (U. S. Code, tit. 11, §§621, 641, 642, 643)

"Sec. 77b, like § 77 of the Bankruptcy Act, had as one of its purposes the establishment of more effective control over reorganization expenses (cases cited) in recognition of the effect which a depletion of the cash resources of the Estate may have on both the fairness and feasibility of the plan of reorganization."

"* * * *

"Moreover, a plan of reorganization must provide 'for the payment of all costs and expenses of administration and other allowances which may be approved or made by the judge.' § 216 (3).

"Thus Chapter X not only contains detailed machinery governing all claims for allowances from the estate."

* * * * * * *

And at page 87:

"Whatever doubts may have once existed as to the functions of a reorganization court, it is clear under this recent bankruptcy legislation that the approval of *all fees as part of the plan* has been entrusted to the bankruptcy court exclusively." (Italics supplied.)

In the *Woods* case,[8] the basic question involved was the power of the District Court to disallow claims for compensation on the ground that the claimants were serving dual or conflicting interests. The claims in that case covered not only 77B proceeding but also earlier State court proceedings.

In that case also the fees claimed were to be paid out of the bankruptcy estate.

There is no doubt that if the fees sought to be recovered here were to be paid out of the bankruptcy estate, sole jurisdiction would be vested in the bankruptcy court. But it is respectfully submitted that the bankruptcy court is not concerned with fees not payable out of the bankruptcy estate, where such fees do not in anyway affect the reorganization.

[8] 312 U. S. 262, 267.

proceedings or the plan before the court. The bankruptcy court is not concerned with an agreement between an attorney and client for services rendered, merely because such services were incidentally involved in a reorganization proceeding, and which were in fact, at least in part, hostile to the Debtor.

A. Bankruptcy courts have only such jurisdiction and powers as are expressly or impliedly conferred on them by Congress.

There is no provision in the Bankruptcy Act granting jurisdiction to the bankruptcy court over fee agreements not affecting the bankruptcy estate. The exclusive jurisdiction of bankruptcy courts over bankrupts and their property, which is exercised in summary form, extends only to the person of the bankrupt and to property in his possession or in the possession of third persons who do not claim adversely to him or whose claims are colorable only. See *In re Standard Gas & Electric Co.* (C. C. A., Del., 1941), 119 F. 2d, 658.

The failure of laws to provide authority to act in any particular contingency results in a lacuna of jurisdiction. *In re Fox West Coast Theatres* (D. C., Cal., 1936), 25 F. Supp. 250, Affirmed 88 F. 2d 212 c. d. 57 S. Court 944, 301 U. S. 710.

B. Section 221(4) of the Bankruptcy Act does not apply to fees not chargeable to the debtor.

1. The payments or promises referred to in § 221 (4) are "by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person". "Any other person", thus associated with the words "the debtor * * * by a corporation * * * under the plan", means only such persons as are associated with the debtor in the plan. The principle of *ejusdem generis* appears to be applicable.

2. The limitation of the section to payments and promises "for services * * * in, or in connection with the proceeding or in connection with the plan and incident to the reorganiza-

tion;" encompasses only payments or promises which in some way affect the reorganization, such as (a) payments or promises for services to the estate, (b) payments or promises which condition or affect the plan of reorganization, (c) payments made or to be made out of the estate or by the reorganized corporation or out of assets destined to or which otherwise would reach the debtor or its creditors.

3. The description of the payments or promises, as well as the enumeration of the payers or promisors, exclude from the scope of the section payments or promises which have no bearing on the reorganization, and which do not in any way affect it.

4. That conclusion is further supported by the requirement that if any payment or promise is not reasonable, the plan shall not be confirmed. That is the prescribed consequence; no alternative or other corrective course is provided in that section. It was not the intention of Congress to defeat a desirable and beneficent plan because of a payment or promise which does not enter into it and is wholly extraneous to it.

5. Moreover, the refusal to approve a plan because of the unreasonableness of payments or promises which are not dependent upon allowance by the court can serve as the corrective pressure, and be operative as such, only on those whose interests require the approval of a proposed plan. The choice of that method of control also indicates the limitation of the intended scope of the supervision and control to the payments and promises which enter into, condition or affect the reorganization.

6. That there is such a limitation appears from still another consideration. The fees to attorneys who defend litigation brought by the trustee, or who institute and conduct proceedings against the trustee, or who advise persons with whom the trustee contracts while carrying on the business of

the debtor, would not be subject to the supervision of the bankruptcy court even though all of such services arise out of, and are connected with the reorganization proceedings. The bankruptcy court is not concerned with such fees or promises because they do not impair the *res* which the court has administered. This is also true in respect to other services which the court finds were rendered, not for the benefit of the estate, and the compensation for which is not chargeable to and is of no interest to the reorganization and of no concern to the court.

7. Apposite here is the holding in *In re P-R Holding Corp.*, 147 F. 2d 895 (C. C. A., 2nd Cir., 1945),[9] that Section 221 (4) "obviously was not intended to require (the disclosure to) and the approval by the court of matters like the commissions paid a broker for the purchase of creditors' certificates" by the proponents of a plan in order to eliminate opposition thereto.

This argument does not necessarily equally limit the scope of the required disclosure, for it is for the court (and not the interested persons) to decide what does and what does not affect the reorganization. The contention here is only that where the court, after full disclosure and consideration, decides that certain payments or promises or claims do not affect or concern the reorganization or the court, Section 221 (4) of the Bankruptcy Act does not empower, much less compel, the bankruptcy court to render final judgment between the interested parties. The bankruptcy court is not concerned with matters not involving the *res* the court is administering, the Debtor's Estate, or the formulation,

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[9] In *P-R Holding Corp.*, 147 F. 2d 895 (C. C. A. 2d Cir., 1945) the Court in discussing Section 221(4); 11 U. S. C. § 621(4) said:

"But the basic purpose of Chapter X is to procure a plan which will best serve the parties legitimately interested; * * *."

* * * * *

"It is true that Section 221(4), 11 U. S. C. A. Section 621(4), requires that all compensation for services rendered in the Reorganization proceeding or in connection with a plan be submitted to judicial scrutiny * * * but it obviously was not intended to require the approval by the Court of matters like the commissions paid a broker for the purchase of creditors certificates."

promulgation or approval and acceptance of a plan of reorganization. With the exception of the *McCrory* and *Reading* cases [10] the courts have deliberately abstained from passing on the rights of attorneys to payment by their clients, other than the Debtor. Although there is no express statement that the Court is without jurisdiction in such matters, such a holding is implicit in them.

C. The federal courts have frequently declined to pass on fee arrangements between attorneys and clients, where compensation is to be paid by the clients for whom the services were rendered, where such services cannot be charged to the debtor, in reorganization proceedings.

In the *Zweifel* case,[11] the court refused to make an allowance to attorneys who had performed services for the Estate. The Debtor had agreed to pay these attorneys $10,000. *after the Estate should be closed.* The District Court found that this was more than the value of their services; that the agreement was not binding on the Court in the Chapter X proceeding and that

> "it had no jurisdiction to determine its validity as an obligation of the debtor. * * * leaving the attorneys free to pursue the matter otherwise as they saw fit."

Undoubtedly the Court's ruling was predicated on the fact that this $10,000. fee was payable after the Estate was closed; and that it had no bearing on the plan or the administration of the Debtor's Estate.

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[10] *In re McCrory Stores Corp.*, 19 Fed. Sup. 917, aff'd 91 F. 2d 947, cert. den. 302 U. S. 725.

In re Philadelphia & Reading Coal & Iron Co., 61 F. Supp. 120 (E. D. Pa., 1945).

[11] *Zweifel; Twolley and Crozier, et al. v. Trans-State Oil Co.*, 99 F. 2d 650 (C. C. A. 5th Cir., 1938).

In the *Mt. Forest Fur Farms* case,[12] the Circuit Court of Appeals said:

> "The District Court found that the services of these attorneys did not aid in the general administration of the estate of the debtor corporation; that their services in connection with formulation of the plan were primarily for the benefit of their special clients; that they have a lien for their fees on the stock to be distributed to their clients, to which they should resort for their fees for services rendered. No abuse of discretion on the part of the District Court appears . . ." (at p. 649)

In the *Greensfelder* case,[13] the plan of reorganization provided that the "Reorganized company shall pay in cash all costs and expenses of administration and other allowances which may be approved by the Court". The Court held (R. p. 60):

> "Such costs and expenses of administration do not include fees for services rendered primarily in the interests of private clients. They include only the services rendered in advancement of the reorganization proceedings and for the benefit of the Estate." (cases cited)
>
> "In the proceedings for the allowance of the fees, the court was not concerned with the question of the amount of fees which Mr. Greensfelder's client or the noteholders' committee might be obligated to pay him."

To the same effect are:

> *In re Standard Gas & Electric Co.*, 106 F. 2d 215, 216 (C. C. A., 3rd C., 1939);

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[12] *In re Mt. Forest Fur Farms of America, Inc.*, 157 F. 2d 640 (C. C. A., 6th Cir., 1946).

[13] *Greensfelder, et al. v. St. Louis Public Service Co., et al.*, 114 F. 2d 53, 59-60, 62 (claim of Carter), 63-64 (claims of Greensfelder and Stein), (C. C. A., 8th Cir., 1940, cert. den. 311 U. S. 714).

In re Watco Corporation, 95 F. 2d 249, 251-2 (C. C. A., 7th C., 1938);

In re Middlewest Utilities Co., 17 F. Sup. 359, 377 (N. D. Ill., 1936).

See also:

In re Paramount-Publix Corporation, 12 F. Sup. 823 (S. D. N. Y., 1935);

London v. *Snyder*, 163 F. 2d 621 (C. C. A., 8th C., 1947);

Cooke v. *Bowersock*, 122 F. 2d 977 (C. C. A., 8th C., 1941) and particularly the next to the last paragraph (at p. 985).

The only exceptions to this line of cases is *In Re McCrory Stores Corp.*, 19 Fed. Sup. 917, affirmed 91 F. 2d 947, c. d. 302 U. S. 725. In this case, the court held that a fee contract with an attorney by a committee of creditors in behalf of the creditors whom they represented, as distinguished from a fee agreement between an attorney and a principal, was subject to the court's revisionary jurisdiction.[14]

However, whatever may be the correct answer, on the basis of authority, to the first branch of the question, there is no precedent for the holding that the bankruptcy court is bound to finally adjudicate all fee questions between attorneys and the clients for whom they appear in reorganization proceedings, regardless of the facts and circumstances and regardless of whether that fee question affects the formulation and ratification of a plan or the administration of the Debtor's Estate, or the reorganization proceeding. That is the deci-

[14] *In re Philadelphia & Reading Coal & Iron Co.*, 61 F. Supp. 120, the court made an allowance for non-compensable as well as for compensable services.

sive question, here.[15] On that question, substantially all of the federal decisions are contrary to the decision rendered herein by the New York Court of Appeals.

The fee agreement in question here had no bearing on or relationship to the plan. It did not vitiate or otherwise affect the plan in any way. It was not a charge on the Debtor's assets and did not affect the reorganization proceeding or the administration of the Debtor's estate. It was a private agreement between attorneys and clients, which provided for compensation for services "hostile to, and not of benefit to the Trustee's action" and "which were not compensable from the fund distributed by order of the court" (R. p. 20). The court held an extended hearing as to the scope of the agreement and if it was intended to be payment for non-compensable services.

The Court found that petitioners had, at the request of respondents, rendered services not compensable from the Debtor's Estate; that for such services, they were entitled to compensation, but that the existence and scope of the agreement was an issue not before the Court (R. p. 21); that no fund has been credited to the depositing stockholders against which any allowance to the attorneys could be charged; and finally, that the court had no jurisdiction to make such a charge against the depositing stockholders (R. p. 23).

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[15] The District Judge, in passing on the claim that this section of the Act imposed on him the duty of passing on the fee claim involved here followed these decisions, stating (R. p.):

"Undoubtedly Section 221(4) requires the court to scrutinize the proposed plant in respect to all phases mentioned in it, and to determine whether the payments made or promised are reasonable or whether they tend to vitiate the plan. But nowhere in it is it recited that the court has the duty of both determining that such an amount paid or promised is reasonable and of making an order requiring the payment of such amount even though it cannot be charged to the fund for distribution. Under Chapter X administrative expenses are authorized, and those who have aided in the reorganization are entitled to compensation for their efforts; but they are awarded such compensation by means of an order upon the trustee by the court. If one had promised compensation to his counsel for his services in a reorganization, but his counsel has not aided in the proceeding, Section 221(4), in the opinion of the court (fol. 32), furnishes no authority for an order, upon the promisor to pay the counsel the amount promised or what, in the opinion of the court, is the reasonable value of his services. The existence and scope of the promise creates an issue not before the court."

The Act deals only with the reorganization of a debtor, its assets and business. It is not concerned with private fee agreements between attorneys and clients relating to legal services rendered in a reorganization proceeding, unless such services relate to a plan of reorganization, its proposal or acceptance, or are "incident to the reorganization".

D. The federal court has consented to the adjudication of the claim in suit by the state courts.

The bankruptcy court here has in effect consented to the adjudication of the claim in suit by the State courts. *In re Matter of Brown (Gerdes)*, 290 N. Y. 468, Judge Finch, in writing the opinion of the Court, said:

> "It is urged that the bankruptcy court could have consented to an adjudication of rights in this real property by our State Courts. * * * That, of course, is true. * * * consent * * * must be for a particular controversy. Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 483."

Justice Frankfurter, in his concurring opinion in the *Brown* [16] case, said, at page 190:

> "Congress from the beginning has allowed federally created rights to be enforced in state courts not only by the general implications of our legal system but also by explicit authorization. The nature of the obligation of the state court under such legislation has been most litigated in connection with the Federal Employers Liability Act * * *."

There is no affirmative policy to enlarge federal jurisdiction. The policy is to leave State issues to State courts, leavink the determination of what intrinsically are merely local questions to the local courts of the State. *Bardes v. First National Bank of Hancarden*, 178 U. S. 524 at 538.

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[16] 321 U. S. 178.

> "The State courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice."
>
> *Lathrop* v. *Drake* (1875), 91 U. S. 516, 518.

For the reasons hereinbefore set forth, the State courts afford an adequate forum for this suit.

POINT II.

THE JUDGMENT BELOW SHOULD BE REVERSED.

The issue in this case is one of first impression. Inasmuch as the compensation sought is not to be paid out of the Debtor's Estate and is for services not beneficial to the Estate and for which the Estate is not chargeable, it is respectfully submitted that the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

SAMUEL MARION,
Attorney for Petitioners.

Supreme Court of the United States

OCTOBER TERM 1948

No. 88

NATHAN D. LEIMAN and SAMUEL MARION,

Petitioners,

against

ALEXANDER GUTTMAN, GEORGE GELLER and ARTHUR BAINTON, individually and as officers and members of the Committee of Preferred Stockholders of Pittsburgh Terminal Coal Corporation, HOWARD S. GUTTMAN, MONROE GUTTMAN, RUDOLPH GUTTMAN, IRENE GUTTMAN and ELIZABETH WOLFERS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM 1948

No.

NATHAN D. LEIMAN and SAMUEL MARION,

Petitioners,

against

ALEXANDER GUTTMAN, GEORGE GELLER and ARTHUR BAINTON, individually and as officers and members of the Committee of Preferred Stockholders of Pittsburgh Terminal Coal Corporation, HOWARD S. GUTTMAN, MONROE GUTTMAN, RUDOLPH GUTTMAN, IRENE GUTTMAN and ELIZABETH WOLFERS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Nature of Matter Involved

There is serious doubt that the petitioners have properly noted jurisdiction in this court pursuant to Section

237(b) Judicial Code (28 U. S. C. 344(b)), and Rule 38, Subdivision 5(a) of the Rules of the Supreme Court.[1]

A brief recital of the background of the controversy demonstrates that jurisdiction in this court is not free from uncertainty.

The action was started by the service of a summons and complaint, in the New York State Supreme Court. The complaint was thereafter amended (R. 8). The amended complaint alleges a hiring of the petitioners by the respondents for services rendered to the respondents in a proceeding under Chapter X of the Bankruptcy Act,

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1. This court appears to have uniformly held that the petitioner must have pleaded a right, title, privilege or immunity under the United States Constitution or a federal statute.

In *Chesapeake and Ohio Railroad Company* v. *McDonald* (1909), 214 U. S. 191 at page 193, this court stated:

> "In this class of cases, the statute requires that such right or privilege must be specifically set up and claimed in the state court * * * and decided it adversely to the claim of the plaintiff in error."

That it is essential there be a denial of the claim was further noted in *Dewey* v. *Des Moines* (1899), 173 U. S. 193, at page 198.

> "In other words, the court must be able to see clearly from the whole record that a provision of the Constitution or Act of Congress is relied upon by the party who brings the writ of error and that the right thus claimed by him was denied."

In *Steele* v. *Louisville & Nashville R. R. Company* (1944), 323 U. S. 192, at page 204, this court noted jurisdiction under section 237b of the Judicial Code (28 U.S.C. 344(b)).

> "Since the right asserted by petitioner is * * * claimed under the Constitution' and a 'statute of the United States' the decision of the Alabama Court, adverse to that contention, is reviewable here * * *."

Home for Incurables v. *New York* (1902), 187 U. S. 155, at page 158.

> "In the case before us, the Home for Incurables has not brought upon the record the fact that it asserted, in the state court, any Federal right whatever. It is entirely consistent with the record that the home did not, at any time pending the case in the state court, set up or claim any such right. If our jurisdiction is invoked on the ground that the judgment of the state court has denied a right, title, privilege or immunity secured by the Constitution of the United States, it is essential, under existing statutes, that such right, title, privilege, or immunity shall have been specially set up or claimed in the state court."

To like effect, see *Strader et al.* v. *Baldwin*, 50 U. S. 261, 262.

The petitioners must first demonstrate jurisdiction under section 237(b) (28 U.S.C. 344(b)), before they attempt to qualify under Rule 38(5)(a) of the Rules of the Supreme Court (Hughes on Federal Practice, page 587).

a deposit of 584 shares of stock of the Pittsburgh Terminal Coal Corporation by respondents providing for additional compensation to the petitioners, an allegation of substantial performance of services, and a failure by respondents to turn over said stock to the petitioners. The prayer for relief sought a mandatory injunction ordering respondents to turn over to petitioners herein the shares of stock in question. Annexed to the complaint and marked Exhibit "A" (R. 10-11) is a letter addressed to the petitioners from Alexander Guttman, Chairman of the Stockholders' Protective Committee.

Pursuant to the contract of hiring, petitioners did render professional services in a Chapter X reorganization proceeding then pending and still pending in the Federal District Court for the Western District of Pennsylvania. Thereupon application was made to the Reorganization Court for an allowance of $125,000 upon a full and detailed recital of all services rendered in the reorganization proceeding. Petitioners, in their application, recited all services and made no separation of compensable from non-compensable services, and did not assert that any of the services so rendered were not compensable out of the bankrupt estate. In accordance with the provisions of Chapter X, petitioners made a full disclosure of the execution of the agreement providing for "additional compensation" to petitioners by respondents. The Reorganization Court granted an allowance of $37,500 instead of the $125,000 sought by petitioners. Petitioners feeling aggrieved thereupon sought a modification of that order in that it be made without prejudice to the claim for "additional compensation". The district court refused to pass upon the claim for additional services declining jurisdiction (R. 17). Thereupon, petitioners

instituted this action in the New York State Supreme Court for a mandatory injunction to compel respondents herein to turn over the shares of stock to the petitioners.

The complaint in the action makes no claim that the services rendered requiring the delivery of the shares were of a nature not compensable out of the bankrupt estate. Nor is there any allegation of a denial of a right, title, privilege or immunity under the Constitution of the United States or a federal statute.

The Legal Issue

The respondents, defendants in the court of first instance, in lieu of answering the amended complaint, moved pursuant to Rule 107, subdivision 2 of the Rules of Civil Practice of the State of New York, to dismiss the amended complaint on the ground that the court did not have jurisdiction of the subject matter of the action. That application was grounded on the position that the amended complaint sought compensation for services alleged to have been rendered by the petitioners in connection with a Chapter X reorganization proceeding and that jurisdiction over such claims had been exclusively delegated to the Reorganization Court by the provisions of Chapter X of the Bankruptcy Act. The pertinent sections of the statute will be hereinafter more fully discussed.

The said motion made by respondents to dismiss the amended complaint was denied by the Supreme Court of the State of New York (R. 2, 25). An appeal to the Appellate Division of the Supreme Court of the State of New York was thereafter taken by respondents. The order of the Supreme Court of the State of New York was affirmed by a divided court. Upon application to the Appellate Division of the Supreme Court, a question

was certified to the Court of Appeals of the State of New York for its determination (R. 28, 29). Petitioners now claim that the certified question is too narrow and does not clearly state the issue (P. 5). It is hardly appropriate for the petitioners to complain about the narrowness of the question as it was the question framed by them which was adopted by the Appellate Division of the New York State Supreme Court and certified to the Court of Appeals.

The Court of Appeals of the State of New York reversed the courts below, answered the question certified to it in the negative and granted the respondents' motion to dismiss the amended complaint on the ground that the Supreme Court of the State of New York was without jurisdiction of the subject matter of the action (R. 37). Thus the only legal question which confronted the state court from which review is sought was a local question of the jurisdiction of the state court in an action for services rendered in connection with a proceeding under Chapter X of the United States Bankruptcy Act.

The Constitution, Applicable Statutes and Legislative History

An examination of the Federal Constitution, pertinent federal statutes and legislative history demonstrates that state courts are without jurisdiction of matters in bankruptcy. Article I, section 8, of the Constitution of the United States provides:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises * * * to establish a uniform rule of naturalization and uniform laws on the subject of bankruptcy throughout the United States."

Congress exercises its power under the Constitution by the enactment of the provisions of the Judicial Code and Judiciary, Section 256 (28 U. S. C. 371), which provides:

> "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several states:
>
> * * * * * * *
>
> Sixth: Of all matters and proceedings in bankruptcy."

Section 221(4) of the Federal Bankruptcy Act (11 U. S. C. 621(4)), provides:

> "The judge shall confirm a plan is satisfied that"
>
> * * *
>
> "(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in or in connection with, the proceedings or in connection with the plan and incident to the reorganization, have been fully disclosed to the Judge and are reasonable, or if to be fixed after confirmation of the plan, will be subject to the approval of the Judge."

It is obvious that this section does not limit the Bankruptcy Court's powers over fees merely to such as are to be charged to the debtor's estate. It expressly requires disclosure to the Bankruptcy Court of all payments made or promised "either by the debtor" or "by any other person" for services rendered in connection with or incident to the reorganization or the plan and further provides for court approval of such payments

only if the amount agreed upon is "reasonable". Clearly, such explicit and broad language is applicable to the fee agreement which is the subject matter of this action brought in the state court.

Sec. 221(4) was included in Chapter X to provide for broader judicial supervision than that contained in Section 77B of the Bankruptcy Act (11 U. S. C. §207) the predecessor Statute to Chapter X. Subsection (f)(5) of Section 77B (11 U. S. C. §207(f)(5)) provided that "the judge shall confirm the plan if satisfied that * * *.

> "(5) all amounts to be paid by the debtor or by any corporation or corporations acquiring the debtor's assets, and all amounts to be paid to committees or reorganization managers, whether or not by the debtor or any such corporation for services or expenses incident to the reorganization, have been fully disclosed and are reasonable, or are to be subject to the approval of the judge;"

This section provided for judicial scrutiny and approval of fees for services in the reorganization rendered only by "committees or reorganization managers", "whether or not" payable "by the debtor or any corporation or corporations acquiring the debtor's assets." Section 221(4) of Chapter X, on the other hand, is far more comprehensive. It includes fees not only of committees and reorganization managers but of all persons serving in the reorganization in a representative capacity and the bankruptcy court's control applies, as we have seen, both where such fees are paid by the debtor, a successor corporation or by any other person. It is apparent from this analysis that the all-inclusive provisions of Section 221(4) were intended to reach private fee arrangements

between security holders and the attorneys retained to represent them in the reorganization under Chapter X.

The correctness of the construction advanced here of section 221(4) is corroborated by the legislative history.

The report on Chapter X by the Senate Committee on the Judiciary, U. S. Senate Report #1916, 75th Congress, 3rd Session (1938), page 36, states:

> "Subsection (4) of Section 221, derived from Section 77B (f)(5) requires full disclosures and the approval by the judge of all payments for services, and for costs and expenses, in connection with the plan or the proceedings, whether such payments are made or promised by the debtor, or by any corporation suceeding it, or by any other person."

The Commission to Congress in its "Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees", referring to the jurisdiction conferred upon the bankruptcy court under Section 77B and Chapter X, states in Part VIII (1940), pp. 253-4:

> "The supervisory power of the court (under Section 77B) over the amount of the fees received by parties to a reorganization was broader than the court's affirmative power to grant allowances out of the estate to these parties. Thus, any allowance of compensation or reimbursements for expenses, when paid by the debtor or by any new corporation acquiring its assets, was subject to final determination by the court. In addition, it was provided that 'all amounts to be paid to committees or reorganization managers, whether or not by the debtor or any such corporation' must receive the approval of the court as a condition of confirmation of the plan.

"There is little argument against, and much good reason for, subjecting all compensation and expenses, from whomsoever received, to the scrutiny and necessity of approval by the court. The provision last quoted above had the merit of supplying judicial scrutiny in the event, for example, of an attempt to compensate reorganization managers or protective committees by the device of a separate charge upon creditors or stockholders who assented to the plan of reorganization. But it lacked inclusiveness, since in terms it applied only to the fees and expenses of managers and committees. To a limited extent, i.e., as to committee attorneys not paid out of the general estate, the courts were able to overcome this difficulty through use of the so-called 'scrutiny' clause of Section 77B. Thus, where a creditors' committee, in behalf of those whom it represented, contracted to pay its attorney 10 percent of any dividends or proceeds of payment paid to creditors represented by the committee, it was held that this exercise of the committee's power, and hence the attorney's remuneration, was subject to review and modification by the court, through the express power in the statute to scrutinize and disregard committee 'authorizations'. Preferably, however, the court's power over compensation and expenses of any persons concerned in the proceedings should be a plenary power to review their reasonableness, from whatever source paid, and such power has now been granted to the courts by the provisions of Chapter X (Section 221(4))."

Collier, in his work on bankruptcy (p. 3891, 1947 edition), commenting on the broader scope of 221(4) as contrasted with its predecessor section, states:

"The provision remedies a defect of former 77B in that the requirements for disclosure and approval

apply to every payment or promise, whether or not made to committees or reorganization managers, and cover payments or promises made not only by the debtor or successor corporation but also by 'any other person' which includes protective committees, attorneys, agents or representatives, as well as the trustee and other officers of the estate.

* * *

"Under 221(4) the 'bankruptcy court has plenary power to review all fees and expenses in connection with the reorganization, from whatever source they may be payable'. It can hardly be denied that subjecting all compensation and expenses from whomsoever received to court scrutiny is desirable."

Control over all fees by the Bankruptcy Court is an indisputable part of the over-all judicial scrutiny of the reorganization process which the reorganization judge is required to exercise. Such power to scrutinize fee agreements and arrangements is explicitly recognized in section 212 of Chapter X (11 U. S. C. 612), sometimes referred to as "the scrutiny clause", which provides:

"The judge may examine and disregard any provision of a deposit agreement, proxy, power or warrant of attorney, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, by the terms of which an agent, attorney, indenture trustee, or committee purports to represent any creditor or stockholder, may enforce an accounting thereunder, may restrain the exercise of any power which he finds to be unfair or not consistent with public policy and may limit any claim or stock acquired by such person or committee in contemplation or in the course of the proceeding under this chapter to the actual consideration paid therefor."

This provision, it is evident, gives the bankruptcy court extensive powers over those serving in a reorganization, in a representative capacity, and over all agreements and authorizations incident to such representation.

Section 242 (11 U. S. C. 642) permits reasonable compensation for services rendered:

(1) "In connection with the administration of an estate * * *" or

(2) "In connection with the plan approved by the judge."

Section 243 (11 U. S. C. 643) provides as follows:

> "The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto."

The language of section 221(4) (11 U. S. C. 621(4)) is considerably broader than that set forth in section 242 (11 U. S. C. 642) and section 243 (11 U. S. C. 643) dealing with compensation out of the assets of the estate. In thus subjecting to judicial scrutiny all payments made or promised, it is clearly the intention of this section of the statute to provide that all payments in the reorgani-

zation proceedings must be made with the approval of the court. Thus it is the responsibility of the reorganization court to supervise the reasonableness of payments for services even when not made out of the estate.

The desire and intent of Congress to abrogate to the federal court exclusive jurisdiction of all federal matters is further demonstrated by section 258 (11 U. S. C. 658), which provides that the federal court shall fix fees for services rendered in prior proceedings whether state or federal. That Congress intended that all fees, allowances and expenses in connection with Chapter X reorganization proceedings are subject to the approval of the Reorganization Court is further borne out by section 216(3) (11 U. S. C. 616(3)) which provides:

> "A plan of reorganization under this Chapter—
> (3) shall provide for the payment of all costs and expenses of administration and other allowances which may be approved or made by the judge."

The Decision of the New York State Court of Appeals is in Accord With the Provisions of the Act and Prior Decisions of this Court

Petitioners in support of their contention that the New York State Court of Appeals incorrectly construed Section 221(4) (11 U. S. C. 621(4)) cite the following cases (P. p. 16):

> *Greensfelder* v. *St. Louis Public Service Company*, 114 F. 2d 53, 59-60, 62 (claim of Carter), 63-64 (claims of Greensfelder and Stein), C.C.A. 8th C. 1940, c.d. 311 U. S. 714;
>
> *In re Mt. Forest Fur Farms of Amerika, Inc.*, 157 F. 2d 640 (C.C.A., 6th C., 1946);

In re Standard Gas & Electric Co., 106 F. 2d 215, 216 (C.C.A., 3rd C., 1939);
Zweifel v. Trans-State Oil Co., 99 F. 2d 650 (C.C.A., 5th C., 1938);
Re Watco Corporation, 95 F. 2d 249, 251-2 (C.C.A., 7th C., 1938);
In re Middlewest Utilities Co., 17 F. Sup. 359, 377 (N.D. Ill., 1936);
In re Paramount-Publix Corporation, 12 F. Sup. 823 (S.D.N.Y., 1935).

A careful analysis of these cases indicates that they were all decided under section 77B of the Chandler Act, subsection (f)(5) (11 U.S.C. 207) which contained features far less comprehensive than chapter X with reference to procedures for supervising fees and allowances. Further, the issue of non-compensable services was not before the Courts in the above cases.

In *Brown* v. *Gerdes*, 321 U. S. 178, Mr. Justice Douglas speaking for this court enunciated the following principle:

> "And Chapter X of the Chandler Act which took the place of §77B set up even more comprehensive supervision over compensation and allowances (H. Rep. No. 1409, 75th Cong. 1st Sess. pp. 45, 46) and provided a centralized control over all administration expenses. • • •
>
> "Thus chapter X not only contains detailed machinery governing all claims for allowances from the estate. It also requires the plan to contain provisions for the payment of all allowances and places on the judge the duty to pass on their reasonableness. The approval of the plan of reorganization has been entrusted to the bankruptcy court exclusively. Even reports on plans submitted by the

> Securities and Exchange Commission are 'advisory only.' §172, 11 U.S.C.A. §572, 3 F.C.A. title 11, §572. It could hardly be contended that the bankruptcy court might dispense with the finding required by §221(2) that the plan is 'fair and equitable, and feasible' and confirm the plan on another basis of delegate the task to another court or agency. See Case v. Los Angeles Lumber Product Co., 308 U. S. 106, 114, 115, 84 L. ed. 110, 119, 120, 60 S. Ct. 1, 41 Am. Bankr. Rep. (NS) 110; Consolidated Rock Products Co. v. Du Bois, 312 U. S. 510, 85 L. ed. 982, 61 S. Ct. 675, 45 Am. Bankr. Rep. (NS) 79. But if that cannot be done, it is difficult to see how a plan could be confirmed which left the approval of certain allowances to a state court. The finding as to allowances required by §221(4) is as explicit and as mandatory as the finding of 'fair and equitable, and feasible' required by §221(2). On each Congress has asked for the informed judgment of the bankruptcy court, not another court or agency. * * *"
>
> "Whatever doubts may have once existed as to the functions of a reorganization court, it is clear under this recent bankruptcy legislation that the approval of all fees as part of the plan has been entrusted to the bankruptcy court exclusively."

Petitioners further seek to support their contention by reference to the cases of *London* v. *Snyder*, 163 Fed. 2 621 (C.C.A. 8th C., 1947) and *Cooke* v. *Bowersack*, 122 Fed. 2 977, (C.C.A. 8th C., 1941) both of which were proceedings arising under Chapter X of the Bankruptcy Act. An examination of these cases merely reveal that the only question involved therein was the amount of allowances paid to counsel out of the debtor's estate, and the power of the Circuit Court to review the determination of the District Court on that question.

Petitioners urge that the language in the last paragraph of the opinion in *Cooke* v. *Bouersack* (cited *supra*) supports their contention. Certainly, nothing is contained therein that can be construed as a finding that the reorganization court did not have jurisdiction over the question of services which were not compensable out of the estate, as that issue was not presented to the court.

Respondents' have always taken the position that they are responsible for non-compensable services, if such were rendered by petitioners, but that the only forum which may consider the question is the reorganization court.

In the language of Justice Douglas, *Brown* v. *Gerdes*, cited *supra* (p. 188);

> "We only hold that the Bankruptcy Court has exclusive authority under Chapter X to fix the allowances for fees."

In the concurring opinion of Mr. Justice Frankfurter in *Brown* v. *Gerdes*, cited *supra*, it is pointed out

> "That where a right arises out of the law of the United States, Congress may, if it sees fit, give to the Federal courts exclusive jurisdiction." (p. 189)

In re McCrory Stores Corp., 19 F. Supp. 917 (S.D.N.Y., 1936), aff'd 91 F. 2d 947 (C.C.A. 2nd C., 1937) c.d. 302 U. S. 725, which was decided under the provisions of section 77B, the reorganization court reduced a fee payable to an attorney for a committee of creditors even though the attorney had a written contract with the committee for a fee far greater than that allowed by the court.

On appeal, the Circuit Court for the 2nd Circuit, affirmed the right of the reorganization judge to reduce fees pay-

able by a creditors' committee pursuant to written agreement to an amount commensurate with the value of the services rendered, even though they be of a non-compensable nature.

The rule was stated as follows:

> "Judge Patterson who made the order held that under sub-division (b)(10) of section 77B 'the duty is laid on the court to see to it that the amount to be received by counsel is no more than commensurate to the services rendered'. Had the reorganization been less successful, he might well have thought the full 10% could fairly be paid, but believing as he did that the agreement was not binding on the court if the compensation under it would result in more than a quantum meruit, he reduced it accordingly * * *. (91 F. 2nd 948)
>
> "When Mr. Cooper continued to perform services in the reorganization proceeding he necessarily acted pursuant to the power of the judge to terminate his contract." (91 F. 2nd 950)

It is noteworthy that in the case of *In re Philadelphia & Reading Coal & Iron Company*, 61 Fed. Supp. 120 (E. D. Pa., 1945), likewise considered under section 77B, the reorganization court not only fixed the amount of compensable services, but when called upon made an allowance for non-compensable services to the attorneys involved. Thus, in passing upon the application of the Philadelphia Bondholders' Committee and counsel the court separated the compensable from the non-compensable services and made an allowance for both.

Kirkpatrick, Justice (p. 127):

> "As pointed out in connection with the request of the indenture trustee, this portion of the services, though in the duties of both committee and counsel

> under their employment and undoubtedly a proper charge against the bondholders, is not compensable by the estate. I fix the reasonable value of such proportion of the services at $7,500 and an allowance from the estate will be made in the amount of $92,500."

The petitioners refer to *In re P. R. Holding Corp.*, 147 F. 2nd 895 (C.C.A. 2nd C. 1945) and attempt to show that the payment of counsel fees for non-compensable services is analogous to brokerage commissions paid to a firm of stockbrokers in connection with the purchase of securities. The court noted the distinction between payments for brokerage commissions and those for fees and allowances for services rendered in a reorganization proceeding.

> "The appellant asserts that Bisgeier & Cohen should have reported the fees paid to Newburger Loeb & Company for acting as broker in the purchase of these certificates. It is true that section 221, subdivision 4, 11 U.S.C.A. section 621, subdivision 4, requires that all compensation for services rendered in the reorganization proceeding or in connection with the plan be submitted to judicial scrutiny. This section aimed to eliminate the practice of fixing reorganization fees and expenses by private arrangement thereby decreasing the effective amount of recovery for the creditors." (p. 899)

The court then concluded that Sec. 221(4) (11 U.S.C. 621(4)) is not applicable to commissions paid to a broker.

The New York State Court of Appeals properly found that a statutory duty had been imposed upon the reorganization court to examine and approve all fees and allowances to the extent that they are reasonable, regard-

less of the source from which they might be payable,[2] that power is vested in the reorganization court and its judicial responsibility can not be delegated to another tribunal. Any other conclusion would frustrate the purposes of the Act and leave security holders exposed to the risk of having their participation reduced through excessive fees, whether by private arrangement or otherwise. The control of fees and allowances exercised by the reorganization court is indispensable to the orderly process of reorganization and cannot be dispensed with or discharged in any other forum.

Conclusion

The petition for a writ of certiorari should be denied for the following reasons:

1. It is extremely doubtful that jurisdiction has been properly noted in this court in accordance with section 237(b) of the Judicial Code (28 U.S.C. 344(b)).

2. Petitioners have not shown, as required by Rule 38, subdivision 5(a) of the Rules of the Supreme Court, that the Court of Appeals of the State of New York has decided a federal question of substance not heretofore determined by this court, or has decided such question not in accord with the applicable decisions of this court.

Respectfully submitted,

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2. *Woods v. City National Bank & Trust Co.*, 312 U. S. 262, 267.

IN THE

Supreme Court of the United States

No. 88

88

NATHAN D. LEIMAN and SAMUEL MARION,
Petitioners,

against

ALEXANDER GUTTMAN, GEORGE GELLER and ARTHUR BAINTON, ETC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS

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IN THE

Supreme Court of the United States

No. 88

NATHAN D. LEIMAN and SAMUEL MARION,

Petitioners,

against

ALEXANDER GUTTMAN, GEORGE GELLER and ARTHUR BAINTON, Etc., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS

Opinions Below

The opinion of the Special Term of the Supreme Court of the State of New York is unofficially reported at 71 N. Y. Supp. 2d 200 (R. 25-26).

The decision of the Appellate Division of the Supreme Court of the State of New York is reported in 272 App. Div. 896 (R. 29).

The decision of the Appellate Division of the Supreme Court of the State of New York permitting an appeal to the Court of Appeals of the State of New York is reported at 272 App. Div. 962 (R. 28-29).

The opinion and decision of the Court of Appeals of the State of New York is reported in 297 N. Y. 201 (R. 31-38).

The order of the Court of Appeals of the State of New York denying plaintiff's motion for reargument is reported in 297 N. Y. 201. It does not appear in the record.

The opinion of Gibson, D. J., reported in 69 Fed. Supp. 656 under title "In Re Pittsburgh Terminal Coal Corporation" (p. 1, brief for petitioners) forms no part of the opinions below.

Question Presented

The only question presented to the Court of Appeals of the State of New York was one certified to that court by the Appellate Division of the Supreme Court of the State of New York, to wit, "Has the Supreme Court of the State of New York jurisdiction over the subject matter of this action to recover for legal services rendered to the stockholders' committee which are not compensable out of the assets of the debtor's estate in a Chapter X reorganization proceeding under the United States Bankruptcy Act" (R. 29). The petitioner's brief (pp. 2-3) under the heading "Question Presented" sets forth a series of questions which were not presented to nor considered by the New York State Court of Appeals. It should be noted that the question of law determined by the New York State Court of Appeals did not contain any of the factual material which petitioner now assumes.

Statement of the Case

The action was instituted by the service of a summons and complaint in the New York State Supreme Court. Thereafter the complaint was amended (R. 8-14). The amended complaint alleges a hiring of petitioners by re-

spondents to represent them in a reorganization proceeding under Chapter 10 of the Bankruptcy Act, a deposit by respondents of 584 shares of stock of the Pittsburgh Terminal Coal Corporation to provide for additional compensation to the petitioners for their services in connection with the reorganization proceeding, an allegation of substantial performance, and a failure by respondents to turn over the said stock to the petitioners. The prayer sought mandatory relief ordering respondents to turn over to petitioners herein the shares of stock in question.

Pursuant to the contract of hiring, petitioners rendered professional services in the reorganization proceeding then and now pending in the Federal District Court for the Western District of Pennsylvania. During the course of the proceedings, application was made by the petitioners to the Reorganization Court for an allowance of $125,000 upon a full and detailed recital of all services rendered in the reorganization proceeding, including those services now characterized by petitioners as non-compensable and which allegedly are the bases for the action instituted by them in the New York State Court.

Petitioners, in their application, recited all services rendered by them in the reorganization proceeding and made no separation of compensable from noncompensable services, and did not assert that any of the services so rendered were not compensable out of the bankrupt estate. The Reorganization Court granted an allowance of $37,500 instead of $125,000 sought by petitioners for their services in the reorganization proceeding. Petitioners, feeling aggrieved, thereupon sought a modification of that order in that it be made without prejudice to the claim for "additional compensation". The District Court refused to pass upon the claim for additional compensation declining "present jurisdiction". (R. 17). Thereupon, peti-

tioners instituted this action in the New York State Supreme Court for a mandatory injunction to compel respondents to turn over the shares of stock referred to in the agreement (R. 10) to the petitioners. The complaint in the action below is bare of any allegation that petitioners (plaintiffs below) sought a recovery for noncompensable services performed by them, nor is any claim made that the services rendered, requiring the delivery of the shares of stock in question, were of a nature not compensable out of the bankrupt estate.

The Legal Issues

(1) The New York State Court of Appeals properly confined itself to a consideration of the question certified to it. The questions raised by the petitioner (brief of petitioners, pp. 2-3) were not before that court upon appeal.

(2) Respondents herein (defendants in the court of first instance), in lieu of answering the amended complaint (R. 8-11) moved pursuant to Rule 107, subdivision 2, of the Rules of Civil Practice of the State of New York, to dismiss the amended complaint on the ground that the court did not have jurisdiction of the subject matter of the action (R. 3). That application was grounded on the position that the amended complaint sought compensation for services alleged to have been rendered by the petitioners in connection with a Chapter X reorganization proceeding, and that jurisdiction over such claims could not be asserted in a State Court since the Bankruptcy Act had delegated jurisdiction to the Reorganization Court pursuant to the provisions of Chapter X of the Bankruptcy Act. Respondents' motion to dismiss the amended complaint was denied by the Supreme Court of the State of New York (R. pp. 2, 25).

An appeal to the Appellate Division of the Supreme Court of the State of New York was thereafter taken by respondents. The order of the Supreme Court of the State of New York was affirmed by a divided Court (R. 29). Leave was granted by the Appellate Division of the Supreme Court of the State of New York to appeal to the Court of Appeals of the State of New York (R. 28-29), and a question was certified to the Court of Appeals of the State of New York by the Appellate Division of the Supreme Court of the State of New York (R. 29). Petitioners contend that the question as certified to the Court of Appeals was too narrow and did not properly state what they now perceive to be the issues involved (Petitioners' brief, pp. 2-3).

It is hardly appropriate for the petitioners to complain about the narrowness of the question as it was the question framed by them which was adopted by the Appellate Division of the New York State Supreme Court and so certified to the Court of Appeals of the State of New York. The Court of Appeals of the State of New York reversed the courts below, answered the question certified to it in the negative, and granted respondents' motion to dismiss the amended complaint for want of jurisdiction (R. 37-38).

I.

The New York State Court of Appeals after due consideration of the applicable statutes and controlling authorities properly decided the question of its own jurisdiction.

(a) A test of the New York State Courts' jurisdiction of the subject matter was the sole issue raised below.

The motion addressed to the complaint confined itself to the legal assertion that the New York State Courts

lacked jurisdiction of the subject matter of the action. It was this contention, urged by respondents, that was considered in the courts below. The New York State Court of Appeals had before it the narrow question of the lack of jurisdiction in state courts to consider an application for fees of a non-compensable nature arising out of a reorganization proceeding under Chapter X of the United States Bankruptcy Act. Quite properly, that court could only decide the question certified to it and no other.

The Civil Practice Act of the State of New York (Sec. 588(4)) provides for certification of a legal question by the Appellate Division of the Supreme Court of the State of New York to the Court of Appeals of the State of New York. The rule is well settled that the sole power of the Court of Appeals in such a case is confined to consideration of the question certified to that court.[1]

The Court of Appeals of the State of New York, in light of its statutory limitations, merely considered the ques-

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[1] *Central Trust Company of New York* v. *Pittsburgh S. & N. R. Co., et al.*, 229 N. Y. 68, 128 N. E. 114 (May 7, 1920), Cardozo, J.:

> "The appeal brought up for review the question certified and no other." (p. 70)

Zenith Bathing Pavilion v. *Fair Oaks S.S. Corp.*, 240 N. Y. 309, 148 N. E. 532 (June 2, 1925), wherein Judge Cardozo, speaking for the court, stated the rule as follows:

> "Upon this appeal, our power of review is limited to the question certified. * * *." (p. 313).

Schieffelin v. *Hylan, et al.*, 229 N. Y. 633, 129 N. E. 937 (October 22, 1920):

> "The order of which review is sought is an intermediate one and this court only acquires jurisdiction by virtue of permission to appeal granted by the Appellate Division on questions certified to us for answer." (p. 634)

Harvard Law Review, Volume LXI, No. 8, September, 1948, page 1449.

tion certified to it by the Appellate Division of the Supreme Court of the State of New York and none other. Its decision received favorable comment in a note in *Harvard Law Review*, Vol. LXI, No. 8, September, 1948, page 1450.

(b) The Constitution of the United States, pertinent statutes and legislative history decisively indicate the correctness of the decision of the New York State Court of Appeals.

The Constitution of the United States vests in the Congress of the United States the power to legislate on the subject of bankruptcy throughout the United States.[2]

Congress exercised that power delegated to it by the Constitution through the enactment of the provisions of the Judicial Code and Judiciary, Section 256 (28 U. S. C. 371):

> "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several states:
>
> * * * * * * * *
>
> Sixth: Of all matters and proceedings in bankruptcy."

Section 221(4) of the Federal Bankruptcy Act (11 U. S. C. 621(4)):

> "The judge shall confirm a plan if satisfied that"
>
> * * *

[2] Article I, section 8, of the Constitution of the United States provides:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises * * * to establish a uniform rule of naturalization and uniform laws on the subject of bankruptcy throughout the United States."

"(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in or in connection with, the proceedings or in connection with the plan and incident to the reorganization, have been fully disclosed to the Judge and are reasonable, or if to be fixed after confirmation of the plan, will be subject to the approval of the Judge."

It is apparent that this section does not limit the Bankruptcy Court's powers over fees merely to such as are to be charged to the debtor's estate. It expressly requires disclosure to the Bankruptcy Court of all payments made or promised "either by the debtor" or "by any other person" for services rendered in connection with or incident to the reorganization of the plan and further provides for court approval of such payments only if the amount agreed upon is "reasonable". Clearly, such explicit and broad language is applicable to the fee agreement which is the subject matter of this action brought in the state court.

Section 221(4) was included in Chapter X to provide for broader judicial supervision than that contained in Section 77B of the Bankruptcy Act (11 U. S. C. §207), the predecessor statute to Chapter X. Subsection (f)(5) of Section 77B (11 U. S. C. §207(f)(5)) provided that "the judge shall confirm the plan if satisfied that * * *

"(5) all amounts to be paid by the debtor or by any corporation or corporations acquiring the debtor's assets, and all amounts to be paid to committees or reorganization managers, whether or not by the debtor or any such corporation for services or expenses incident to the reorganization, have been fully disclosed and are reasonable, or are to be subject to the approval of the judge;"

This section provided for judicial scrutiny and approval of fees for services in the reorganization rendered only by "committees or reorganization managers", "whether or not" payable "by the debtor or any corporation or corporations acquiring the debtor's assets." Section 221(4) of Chapter X, on the other hand, is far more comprehensive. It includes fees not only of committees and reorganization managers but of all persons serving in the reorganization in a representative capacity and the bankruptcy court's control applies, as we have seen, both where such fees are paid by the debtor, a successor corporation or by any other person. It is apparent from this analysis that the all-inclusive provisions of Section 221(4) were intended to reach private fee arrangements between security holders and the attorneys retained to represent them in the reorganization under Chapter X.

The correctness of the construction advanced here of Section 221(4) is corroborated by the legislative history of that section.[3]

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[3] The report on Chapter X by the Senate Committee on the Judiciary, U. S. Senate Report #1916, 75th Congress, 3rd Session (1938), page 36, states:

> "Subsection (4) of Section 221, derived from Section 77B (f) (5), requires full disclosures and the approval by the judge of all payments for services, and for costs and expenses, in connection with the plan or the proceedings, whether such payments are made or promised by the debtor, or by any corporation succeeding it, or by any other person."

The Commission to Congress in its "Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees", referring to the jurisdiction conferred upon the bankruptcy court under Section 77B and Chapter X, states in Part VIII (1940), pages 253-4:

> "The supervisory power of the court (under Section 77B) over the amount of the fees received by parties to a reorganization was broader than the court's affirmative power to grant allowances out of the estate to these parties. Thus, any allowance of compensation or reimbursement for expenses, when paid by the debtor or by any new corporation acquiring its

Collier, in his work on bankruptcy (p. 3891, et seq., 14th ed. 1971), commenting on the broader scope of 221(4) as contrasted with its predecessor section, states:

> "The provision remedies a defect of former 77B in that the requirements for disclosure and approval apply to every payment or promise, whether or not made to committees or reorganization managers, and cover payments or promises made not only by the debtor or successor corporation but also by 'any other person' which includes protective committees, attorneys, agents or representatives, as well as the trustee and other officers of the estate.

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assets, was subject to final determination by the court. In addition, it was provided that 'all amounts to be paid to committees or reorganization managers, whether or not by the debtor or any such corporation' must receive the approval of the court as a condition of confirmation of the plan.

"There is little argument against, and much good reason for, subjecting all compensation and expenses, from whomsoever received, to the scrutiny and necessity of approval by the court. The provision last quoted above had the merit of supplying judicial scrutiny in the event, for example, of an attempt to compensate reorganization managers or protective committees by the device of a separate charge upon creditors or stockholders who assented to the plan of reorganization. But it lacked inclusiveness, since in terms it applied only to the fees and expenses of managers and committees. To a limited extent, i.e., as to committee attorneys not paid out of the general estate, the courts were able to overcome this difficulty through use of the so-called 'scrutiny' clause of Section 77B. Thus, where a creditors' committee, in behalf of those whom it represented, contracted to pay its attorney 10 percent of any dividends or proceeds of payment paid to creditors represented by the committee, it was held that this exercise of the committee's powers, and hence the attorney's remuneration, was subject to review and modification by the court, through the express power in the statute to scrutinize and disregard committee 'authorizations'. Preferably, however, the court's power over compensation and expenses of any persons concerned in the proceedings should be a plenary power to review their reasonableness from whatever source paid, and such power has now been granted to the courts by the provisions of Chapter X (Section 221(4))."

"Under 221(4) the bankruptcy court has plenary power to review all fees and expenses in connection with the reorganization, from whatever source they may be payable. It can hardly be denied that subjecting all compensation and expenses from whomsoever received to court scrutiny is desirable."

Control over all fees by the Bankruptcy Court is an indisputable part of the over-all judicial scrutiny of the reorganization process which the reorganization judge is required to exercise. Such power to scrutinize fee agreements and arrangements is explicitly recognized in Section 212 of Chapter X (11 U. S. C. 612), sometimes referred to as "the scrutiny clause", which provides:

"The judge may examine and disregard any provision of a deposit agreement, proxy, power or warrant of attorney, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, by the terms of which an agent, attorney, indenture trustee, or committee purports to represent any creditor or stockholder, may enforce an accounting thereunder, may restrain the exercise of any power which he finds to be unfair or not consistent with public policy and may limit any claim or stock acquired by such person or committee in contemplation of or in the course of the proceeding under this chapter to the actual consideration paid therefor."

This provision, it is evident, gives the bankruptcy court extensive powers over those serving in a reorganization in a representative capacity, and over all agreements and authorizations incident to such representation.

Section 242 (11 U. S. C. 642) permits reasonable compensation for services rendered:

(1) "In connection with the administration of an estate * * * or

(2) "In connection with the plan approved by the judge."

Section 243 (11 U. S. C. 643) provides as follows:

> "The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto."

The language of Section 221(4) (11 U. S. C. 621(4)) is considerably broader than that set forth in Section 242 (11 U. S. C. 642) and Section 243 (11 U. S. C. 643) dealing with compensation out of the assets of the estate. In thus subjecting to judicial scrutiny all payments made or promised, it is clearly the intention of this section of the statute to provide that all payments in the reorganization proceedings must be made with the approval of the court. Thus it is the responsibility of the reorganization court to supervise the reasonableness of payments for services even when not made out of the estate.

The desire and intent of Congress to delegate to the federal court exclusive jurisdiction of all federal matters is further demonstrated by Section 258 (11 U. S. C. 658), which provides that the federal court shall fix fees for services rendered in prior proceedings whether state or

federal. That Congress intended that all fees, allowances and expenses in connection with Chapter X reorganization proceedings are subject to the approval of the Reorganization Court is further borne out by Section 216(3) (11 U. S. C. 616(3)) which provides:

> "A plan of reorganization under this Chapter . . . (3) shall provide for the payment of all costs and expenses of administration and other allowances which may be approved or made by the judge."

(c) Claims for fees for services rendered in a Chapter 10 reorganization proceeding, even though not payable out of debtor's estate, may not be asserted in any forum other than the reorganization court.

The decision of the New York State Court of Appeals is in accord with the provisions of Chapter 10 of the Bankruptcy Act and prior decisions of this court.

In *Brown v. Gerdes*, 321 U. S. 178 (1944), Mr. Justice Douglas speaking for this court enunciated the following principle:

> "And Chapter X of the Chandler Act which took the place of §77B set up even more comprehensive supervision over compensation and allowances (H. Reps. No. 1409, 75th Cong., 1st Sess., pp. 45, 46) and provided a centralized control over all administration expenses.
>
> "Thus chapter X not only contains detailed machinery governing all claims for allowances from the estate. It also requires the plan to contain provisions for the payment of all allowances and places on the judge the duty to pass on their reasonableness. The approval of the plan of reorganization has been entrusted to the bankruptcy court exclusively. Even reports on plans submitted by the Securities and Exchange Commission are advisory

only.' §172, 11 U.S.C.A. §572, 3 F.C.A. title 11, §572. It could hardly be contended that the bankruptcy court might dispense with the finding required by §221(2) that the plan is 'fair and equitable, and feasible' and confirm the plan on another basis of delegate the task to another court or agency. See Case v. Los Angeles Lumber Product Co., 308 U. S. 106, 114, 115, 84 L. ed. 110, 119, 120, 60 S. Ct. 1, 41 Am. Bankr. Rep. (NS) 110; Consolidated Rock Products Co. v. Du Bois, 312 U. S. 510, 85 L. ed. 982, 61 S. Ct. 675, 45 Am. Bankr. Rep. (NS) 79. But if that cannot be done, it is difficult to see how a plan could be confirmed which left the approval of certain allowances to a state court. The finding as to allowances required by §221(4) is as explicit and as mandatory as the finding of 'fair and equitable, and feasible' required by §221(2). On each Congress has asked for the informed judgment of the bankruptcy court, not another court or agency. * * *"

"Whatever doubts may have once existed as to the functions of a reorganization court, it is clear under this recent bankruptcy legislation that the approval of all fees as part of the plan has been entrusted to the bankruptcy court exclusively."

Respondents have consistently taken the position that they are responsible for non-compensable services if such were rendered by petitioners, but that the only forum which may consider the question is the Reorganization Court.

In the language of Justice Douglas, *Brown v. Gerdes*, cited *supra* (p. 188):

"We only hold that the Bankruptcy Court has exclusive authority under Chapter X to fix the allowances for fees."

In the concurring opinion of Mr. Justice Frankfurter in *Brown v. Gerdes*, cited *supra*, it is pointed out

> "That where a right arises out of the law of the United States, Congress may, if it sees fit, give to the Federal courts exclusive jurisdiction." (p. 189)

In re McCrory Stores Corp., 19 F. Supp. 947 (S.D.N.Y., 1936), aff'd 91 F. (2d) 947 (C.C.A. 2nd Cir., 1937), cert. 302 U. S. 725, which was decided under the provisions of Section 77B, the reorganization court reduced a fee payable to an attorney from a committee of creditors even though the attorney had a written contract with the committee for a fee far greater than that allowed by the court.

On appeal, the Circuit Court for the 2nd Circuit, affirmed the right of the reorganization judge to reduce fees payable by a creditors' committee pursuant to written agreement to an amount commensurate with the value of the services rendered, even though they be of a non-compensable nature.

The rule was stated as follows:

> "Judge Patterson who made the order held that under sub-division (b)(10) of section 77B 'the duty is laid on the court to see to it that the amount to be received by counsel is no more than commensurate to the services rendered'. Had the reorganization been less successful, he might well have thought the full 10% could fairly be paid, but believing as he did that the agreement was not binding on the court, if the compensation under it would result in more than a quantum meruit, he reduced it accordingly * * *." (91 F. (2nd) 948)
>
> "When Mr. Cooper continued to perform services in the reorganization proceeding he necessarily acted pursuant to the power of the judge to terminate his contract." (91 F. (2nd) 950)

It is noteworthy that in the case of *In re Philadelphia & Reading Coal & Iron Company*, 61 Fed. Supp. 120 (E.D. Pa., 1945), likewise considered under Section 77B, the reorganization court not only fixed the amount of compensable services, but when called upon made an allowance for non-compensable services to the attorneys involved. Thus, in passing upon the application of the Philadelphia Bondholders' Committee and counsel the court separated the compensable from the non-compensable services and made an allowance for both.

Kirkpatrick, Justice (p. 127):

> "As pointed out in connection with the request of the indenture trustee, this portion of the services, though in the duties of both committee and counsel under their employment and undoubtedly a proper charge against the bondholders, is not compensable by the estate. I fix the reasonable value of such proportion of the services at $7,500 and an allowance from the estate will be made in the amount of $92,500."

The New York State Court of Appeals properly found that a statutory duty had been imposed upon the reorganization court to examine and approve all fees and allowances to the extent that they are reasonable, regardless of the source from which they might be payable, that power is vested in the reorganization court and its judicial responsibility can not be delegated to another tribunal. Any other conclusion would frustrate the purposes of the Act and leave security holders exposed to the risk of having their participation reduced through excessive fees—whether by private arrangement or otherwise. The control of fees and allowances exercised by the reorganization court is indispensable to the orderly process

of reorganization and cannot be dispensed with or discharged in any other forum.

It is significant to note that this Court has sustained the plenary power of the Bankruptcy Court to control in a Chapter X reorganization proceeding all fees whenever and in whatever form the question arose.

Woods v. City National Bank & Trust Co., 312 U. S. 262, 267 (1940).

II

The authorities relied upon by petitioners have no applicability to a reorganization proceeding arising under Chapter 10, Bankruptcy Act.

The petitioners rely upon *In re P. B. Holding Corp.*, 147 F. (2nd) 895 (C.C.A. 2nd C., 1945) (petitioners' brief, p. 15), and attempt to show that the payment of counsel fees for non-compensable services is analogous to brokerage commissions paid to a firm of stockbrokers, in connection with the purchase of securities. The court noted the distinction between payments for brokerage commissions and those for fees and allowances for services rendered in a reorganization proceeding:

> "The appellant asserts that Bisgeier & Cohen should have reported the fees paid to Newburger Loeb & Company for acting as broker in the purchase of these certificates. It is true that section 221, subdivision 4, 11 U.S.C.A. section 621, subdivision 4, requires that all compensation for services rendered in the reorganization proceeding or in connection with the plan be submitted to judicial scrutiny. This section aimed to eliminate the practice of fixing reorganization fees and expenses by private arrangement thereby decreasing the effective amount of recovery for the creditors." (p. 899)

The court then concluded that Section 221(4) (11 U.S.C. 621(4)) is not applicable to commissions paid to a broker.

In the light of the 2nd Circuit Court's determination in the *McCrory Stores* case (*supra*) there is nothing in Judge Frank's opinion in the *L. B. Holding Corp.* case the principle that had there been presented to the Court a private fee arrangement, it would have been scrutinized and passed upon.

The petitioners endeavor to find comfort for their contention in the following decisions rendered by the various Circuit and District Courts:

Zweifel v. Trans-State Oil Company, 99 F. (2d) 650 (C.C.A. 5th Cir. 1938);

In re Mt. Forest Fur Farms of America, 157 F. (2d) 640 (C.C.A. 6th C., 1946);

Greensfelder, et al. v. St. Louis Public Service Co., et al., 114 F. (2d) 53 (C.C.A. 8th Cir., 1940);

Standard Gas & Electric Company, 106 F. (2d) 215 (C.C.A. 3rd C., 1939);

In re Watco Corp., 95 F. (2d) 249 (C.C.A. 7th C., 1938);

In re Middlewest Utilities Co., 17 Fed. Supp. 359 (N. D. Ill., 1936).

None of the above cited cases relied upon by petitioners to support their contention that the courts have frequently declined to pass upon private fee arrangements between attorneys and stockholders' committees, were considered under Chapter X of the Bankruptcy Act (Section 221(4)). These cases were proceedings under Section 77(B) which, as this court has noted in *Brown v. Gerdes* (*supra*), is far less comprehensive than the present Chapter X. The question of the power and duty of the

court to scrutinize private fee arrangements involving non-compensable services even in a 77(B) case were not directly presented to the court in the cited cases. When the court was confronted with such an issue, it was not at all reluctant to scrutinize the private fee arrangement even under Section 77(B) and set it aside.[1]

In the *Zuccifel* case cited by petitioners (brief, p. 16), the Circuit Court of Appeals for the 5th Circuit only had before it the question of compensation payable out of the debtor estate. The court was not called upon to pass upon the question of additional compensation promised by the debtor in reorganization. In that case, the District Court had found that since the applicants were to receive a further fee from the reorganized debtor, that no allowance would be made from the estate. The one and only question on appeal to the Circuit Court was that of an allowance from the estate of the debtor.

Judge Holmes, speaking for the 5th Circuit, disposed of that question in the following language:

> "The court below neither approved or disapproved the agreement for additional compensation, but assumed that it was binding on the debtor. We also withhold approval or disapproval as beyond our jurisdiction on this appeal."

In the *Mt. Forest Fur Farms of America* case (*supra*), the court, in considering the claim of two attorneys for fees from the estate, merely held that such services were not of any assistance in the reorganization and could not be charged against the debtor estate. The court was neither requested nor called upon to make an allowance of a non-compensable nature.

[1] *In Re McCrory Stores Corp.*, 19 Fed. Supp. 917, aff'd 91 F. (2d) 947, cert. den. 302 U. S. 725.

In the *Greensfelder* case (*supra*), the Circuit Court, 8th Circuit, merely had the question of allowances for services rendered by attorneys before it. It did not decide or pass upon any application with reference to services of a non-compensable nature. Petitioners misconstrue the court's language in the *Greensfelder* case when the court stated that the obligation for payment of non-compensable services rests upon Mr. Greensfelder's client. The respondents herein do not dispute the personal obligation to pay for non-compensable services rendered in connection with a reorganization proceeding. The sole issue in this case is the appropriate forum where such a claim may be asserted. The respondents have urged that the exclusive forum for the ascertainment of the value of such non-compensable services is the Reorganization Court and none other.

Petitioners further seek to support their contention by reference to the cases of *London* v. *Snyder*, 163 F. (2d) 621 and *Cooke* v. *Bowersack*, 122 F. (2) 977, both of which were proceedings arising under Chapter X of the Bankruptcy Act. An examination of these cases merely reveals that the only question involved therein was the amount of allowances paid to counsel out of the debtor's estate, and the power of the Circuit Court to review the determination of the District Court on that question.

Petitioners urge that the language in the last paragraph of the opinion in *Cooke* v. *Bowersack* (cited *supra*), supports their contention. Certainly, nothing is contained therein that can be construed as a finding that the reorganization court did not have jurisdiction over the question of services which were not compensable out of the estate, as that issue was not presented to the court.

III

In matters involving Chapter X Reorganization Proceedings, the Federal Court may not delegate its authority over fees and allowances to any other court or agency.

The petitioners urge that the Federal Court by its decision consented to the adjudication of their claims in the State Court (petitioners' brief, p. 20). As legal authority for this contention, they rely upon *In Re Brown (Gerdes)*, 290 N. Y. 468 (April, 1943), and quote from the opinion in that case. A careful examination of the opinion in the cited case fails to disclose the quoted language. On the other hand, Judge Finch, writing for the New York State Court of Appeals, held:

> "Any attempted surrender of jurisdiction by the United States Court, even if that were possible, would have to be implied. This court has ruled that there may be no implied surrender of the jurisdiction of the Federal court over a matter arising in the course of a bankruptcy proceeding. Palmer *v.* Larchmont Manor Co., 284 N. Y. 288, 30 N. E. 2d 599." (p. 474)

Petitioners also employ some language from Mr. Justice Frankfurter's concurring opinion in *Brown v. Gerdes* (*supra*), in an attempt to support their contention on this point (Petitioners' brief, p. 20).

A complete examination of Mr. Justice Frankfurter's opinion indicates that he concurred with the opinion of the court that the District Court could not delegate its responsibility and duty with respect to fees and allow-

ances in a Chapter 10 reorganization proceeding. Mr. Justice Frankfurter used the following language (p. 188):

> "Since 1789, rights derived from Federal law could be enforced in State courts unless Congress confined their enforcement to the Federal courts."

And at page 189

> "The upshot of the matter is that 'rights, whether legal or equitable, acquired under laws of the United States, may be prosecuted in the United States Courts or in the State courts competent to decide rights of the like character and class, subject, however, to this qualification: that where a right arises under a law of the United States, Congress may, if it sees fit, give to the Federal courts exclusive jurisdiction'. Claflin v. Houseman, 93 U. S. 130, 136, 137, 23 L. Ed. 833, 838."

Mr. Justice Douglas, in delivering the opinion of the court, noted the exclusive jurisdictional features of Section 221(4) of the Bankruptcy Act (p. 183).

Exclusive jurisdiction features in a Federal statute have repeatedly been upheld by this court.[5]

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[5] *Yakus* v. *U. S.*, 321 U. S. 414 (March 1944); *Bowles* v. *Willingham*, 321 U. S. 503 (March 1944).

IV

CONCLUSION

The judgment below should be sustained.

The beneficial purposes and public policy underlying the enactment of Section 221(4) of the Bankruptcy Act, and the safeguarding of the interests of security holders, can only effectively be accomplished by requiring the Bankruptcy Court to scrutinize all fee arrangements and determine the reasonableness of such arrangements and fix the quantum of all such fees. Any other result would frustrate and defeat the salutary purpose sought to be accomplished by the enactment of Chapter X.

Respectfully submitted,

LEO PRAEGER,
Attorney for Respondents.

LEO PRAEGER,
BARNEY ROSENSTEIN,
On the Brief.

No. [illegible]

In the Supreme Court of the United States

October Term, 1946

Nathan D. Leiman and Samuel Marion, petitioners

v.

Alexander Guterman, George Gellis and Arthur Hainson, Individually and as Officers and Members of the Committee of Preferred Stockholders of Pittsburgh Terminal Coal Corporation, Howard S. Guterman, [illegible] Guterman, Rudolph Guterman, [illegible] Guterman, and Elizabeth Wolfers

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR SECURITIES AND EXCHANGE COMMISSION AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 88

NATHAN D. LEIMAN, AND SAMUEL MARION, PETITIONERS

v.

ALEXANDER GUTTMAN, GEORGE GELLER AND ARTHUR BAINTON, INDIVIDUALLY AND AS OFFICERS AND MEMBERS OF THE COMMITTEE OF PREFERRED STOCKHOLDERS OF PITTSBURGH TERMINAL COAL CORPORATION, HOWARD S. GUTTMAN, MONROE GUTTMAN, RUDOLPH GUTTMAN, IRENE GUTTMAN, AND ELIZABETH WOLFERS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

This controversy arises as an incident to the reorganization of Pittsburgh Terminal Coal Corporation, a debtor in reorganization under Chapter X of the Bankruptcy Act (11 U. S. C. § 501 *et seq.*) in the United States District Court for the Western District of Pennsylvania. The Securities and Exchange Commission has participated in the reorganization proceedings pursuant to Section 208 of Chapter X (11 U. S. C.

§ 608). In the proceedings before the New York Court of Appeals, the Commission filed a brief *amicus curiae* pursuant to permission granted by that Court. This brief is submitted by the Commission as *amicus curiae* in support of the respondents.

OPINIONS BELOW

The opinion of the Special Term of the New York Supreme Court has been published in 71 N. Y. S. (2d) 200 (R. 25–26). The Appellate Division, First Department, affirmed without opinion, two Justices dissenting, 272 App. Div. 896, 72 N. Y. S. (2d) 406 (R. 29). The opinion of the New York Court of Appeals (R. 31–36), reversing the Special Term and the Appellate Division, is reported in 297 N. Y. 201.

JURISDICTION

The judgment of the New York Court of Appeals was entered on March 12, 1948 (R. 37–38). A motion for reargument was denied on July 16, 1948, reported at 298 N. Y. 618. A petition for a writ of certiorari was filed June 10, 1948, and granted October 11, 1948 (R. 39). Jurisdiction of this Court is invoked under 28 U. S. C. 1257.

QUESTION PRESENTED

The following question, certified by the Appellate Division for review by the New York Court of Appeals (R. 27–28), is now before this Court:

> Has the Supreme Court of the State of New York jurisdiction over the subject

matter of this action to recover for legal services rendered to the stockholders committee which are not compensable out of the assets of the Debtor's estate, in a Chapter X reorganization proceeding under the United States Bankruptcy Act?

The New York Court of Appeals answered this question in the negative, holding that the state court had no jurisdiction because the subject matter involved herein was within the exclusive jurisdiction of the bankruptcy court wherein the reorganization proceedings were pending.

STATUTES INVOLVED

The pertinent provisions of Chapter X involved in this case are set forth in Appendix A, *infra*, pp. 37–38.

STATEMENT

In 1940–41 petitioners and another attorney (hereinafter referred to as "the attorneys") were retained as counsel for a Protective Committee representing public holders of the preferred stock of Pittsburgh Terminal Coal Corporation, the debtor in reorganization. Sometime thereafter, the attorneys, apparently concerned lest the work for which they had been engaged might not be compensated, or might be inadequately compensated, out of the estate, sought from the Committee a more definite commitment with respect to their compensation. In 1943, following a period of negotiation, an agreement was executed. This agreement, which took the form

of a letter from the Chairman of the Committee, stated that the Committee had secured 584 shares of the debtor's preferred stock from four named stockholders—two being members of the Committee and the other two individual stockholders—for the purpose of affording the attorneys "additional compensation" for their services in the proceedings. The letter agreement further stated that the shares of preferred stock thus obtained will be held in escrow for delivery to the attorneys at such time as the reorganization proceedings "are finally terminated and a final settlement of all suits and claims made by this Committee in behalf of the preferred stockholders have been settled." Delivery of the escrowed stock was further conditioned upon satisfactory performance by the attorneys of their "duties as counsel to this Committee until the termination of all proceedings". (R. 4–6, 10–11.)

On October 3, 1945, after confirmation of the plan of reorganization, the attorneys applied to the federal bankruptcy court for an allowance out of the debtor's estate of fees in the amount of $125,000 for all services rendered to the Committee (R. 5). This application was construed by the District Judge as a waiver of the attorneys' rights for additional compensation under the escrow agreement, and accordingly, in allowing the attorneys total fees of $37,500 by order dated November 16, 1945, the Judge qualified the allowance by providing that the "present order

is made upon the statement that the original agreement with the Protective Committee is set aside" (R. 18). On November 26, 1945, this qualification was vacated by the judge on *ex parte* application of the attorneys (R. 18–19), and on January 17, 1946, was reinstated upon the Committee's application for lack of notice (R. 19). The attorneys thereupon moved by formal petition for a modification of the order of November 16, 1945, claiming that the fee allowances out of the debtor's estate should have been granted without prejudice to the rights of the attorneys to the escrowed stock as additional compensation under the agreement. At the hearing on this petition, the Committee appeared and, although assenting to the jurisdiction of the court, disputed the right of the attorneys to further compensation under the agreement, while the attorneys took the position that the bankruptcy court lacked jurisdiction over the escrow agreement and opposed any determination of the fees payable thereunder (R. 19). The Commission as a party to that proceeding urged that the bankruptcy court had exclusive jurisdiction to determine the reasonable worth of all the attorneys' services. On the assumption that the attorneys were entitled to some payment under the escrow agreement, the Commission recommended $70,000 as the reasonable value of all the services, whether or not compensable out of the estate. Had this recommendation been followed

by the reorganization judge, petitioners would have received $32,500 under the escrow agreement in addition to the $37,500 allowed by the court out of the estate.

As set forth in its opinion of January 22, 1947 (R. 17–23), reported in *In re Pittsburgh Terminal Coal Corp.*, 69 F. Supp. 656 (W. D. Pa.), the District Court concluded that it was without jurisdiction to enforce the agreement and to determine the amount due the attorneys thereunder. Accordingly, the District Court modified its order of November 16, 1945, to provide that the allowance to the attorneys of $37,500 out of the debtor's estate was without prejudice to whatever rights they might have under the escrow agreement (R. 17). No appeal was perfected from the District Court's order.[1]

Thereafter, the attorneys instituted in the New York Supreme Court the present suit for specific performance of the agreement and for delivery of the stock in accordance with the terms of the escrow agreement and other appropriate relief (R. 8–11). Respondents filed a motion to dismiss for lack of jurisdiction, contending that the bankruptcy court in which the reorganization proceedings were pending had exclusive jurisdiction over the subject matter (R. 3–7). By order entered April 7, 1947, the trial court denied the

[1] Although the Commission is a statutory party in Chapter X proceedings, it has no standing to appeal. Section 208, 11 U. S. C. § 608.

motion to dismiss (R. 25–26). This order was affirmed by order of the Appellate Division dated June 24, 1947, two justices dissenting (R. 29). The Court of Appeals, three justices dissenting, reversed the court below, holding that the motion to dismiss the action should have been granted (R. 31–38).

ARGUMENT

In *Brown* v. *Gerdes*, 321 U. S. 178, this Court held that under Section 221 (4) (11 U. S. C. § 621 (4)), the bankruptcy court has exclusive jurisdiction over attorney's fees payable out of the debtor's estate. The question here is whether Section 221 (4) is similarly applicable to fees incident to the reorganization but not payable out of the estate. It is our view, that the bankruptcy court has jurisdiction to determine all fees for legal services rendered by petitioners as counsel for a protective committee representing public security holders, even though the fees agreed upon are to be paid by security holders (Point I), and that such jurisdiction is necessarily exclusive (Point II).

I

THE BANKRUPTCY COURT HAS JURISDICTION TO FIX THE AMOUNT OF ALL FEES FOR LEGAL SERVICES PERFORMED BY COUNSEL FOR A COMMITTEE IN A REORGANIZATION PROCEEDING REGARDLESS OF THE SOURCE OF PAYMENT OF SUCH FEES

1. The power to review and determine compensation payable from a source other than the

debtor's estate is vested in the bankruptcy court by Section 221 (4),[2] which provides:

> The judge shall confirm a plan if satisfied that * * *
>
> (4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan *or by any other person,* for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and *incident to* the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge. [Italics supplied.]

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[2] The court below, although referring to Section 221 (4), also thought that Section 242 (11 U. S. C. § 642) "governs this case" (R. 33). This section reads as follows:

"The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—

"(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;

"(2) by any other parties in interest except the Securities and Exchange Commission; and

"(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission."

It has been the Commission's view that this case is governed by Section 221 (4), the broad statements of which are clearly applicable to the fee agreement involved herein, without regard for Section 242.

It is obvious from a mere reading of the text that this section does not limit the bankruptcy court's powers over fees merely to such as are to be charged to the debtor's estate. It expressly requires disclosure to the bankruptcy court of "all payments made or promised" either by the debtor or "by any other person" for services rendered "in connection with," or "incident to," the reorganization or the plan, and further provides for court approval of such payments only if the amount agreed upon is "reasonable," or, if payable after confirmation, "will be subject to the approval of the judge." Clearly, such explicit and broad language is applicable to the fee agreement which is the subject of the present action.

Section 221 (4) expands and defines more affirmatively the control over reorganization fees which bankruptcy courts had exercised to an extent under the less comprehensive provisions of former Section 77B, 48 Stat. 911, 912. Section 77B (f) (5), the predecessor to Section 221 (4), provided only for judicial scrutiny and approval of fees for services in the reorganization rendered by "committees or reorganization managers," whether or not payable "by the debtor or any corporation or corporations acquiring the debtor's assets."[3] Nevertheless, on the basis of

[3] Section 77B (f) (5) provided that "the judge shall confirm the plant if satisfied that * * * (5) all amounts to be paid by the debtor or by any corporation or corporations acquiring the debtor's assets, and all amounts

the court's statutory power to review all agreements affecting the interests of creditors in the reorganization, it had been held that the bankruptcy court had the responsibility to review fees agreed to be paid by creditors directly and not the debtor's estate.[4] Section 221 (4) now affirms that responsibility more explicitly by requiring judicial review of all fees, including private fee arrangements between security holders and those authorized to represent them in the reorganization proceedings.[5] As the court said in *In re P–R Holding Corp.*, 147 F. (2d) 895, 899 (C. C. A. 2), Section 221 (4) was

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to be paid to committees or reorganization managers, whether or not by the debtor or any such corporation for services or expenses incident to the reorganization, have been fully disclosed and are reasonable, or are to be subject in the approval of the judge".

[4] See *In re McCrory Stores Corp.*, 19 F. Supp. 917 (S. D. N. Y.), affirmed, 91 F. (2d) 947 (C. C. A. 2), certiorari denied, 302 U. S. 725, pp. 21–23, *infra*. (See also Appendix B, *infra*.)

[5] See *Woods* v. *City Nat. Bank & Trust Co.*, 312 U. S. 262, 267, wherein it is stated that under Section 221 (4) "the bankruptcy court has plenary power to review *all* fees and expenses in connection with the reorganization from whatever source they may be payable." [Italics supplied.]

This is also the view expressed in the Report on Chapter X by the Senate Committee on the Judiciary, S. Rep. No. 1916, 75th Cong., 3d Sess., which states at p. 36:

"Subsection (4) of section 221, derived from section 77B (f) (5), requires full disclosure and the approval by the judge of *all* payments for services, and for costs and expenses, in connection with the plan or the proceedings, whether such payments are made or promised by the debtor, or by any corporation succeeding to it, or *by any other person*." [Italics supplied.]

aimed to eliminate the practice of fixing reorganization fees and expenses by private arrangement, thereby decreasing the effective amount of recovery of the creditors.[6]

2. Extensive investigations conducted by the Congress and by the Commission prior to the passage of Chapter X disclosed widespread abuses in equity receivership proceedings, whereby all too often protective committees and their counsel had used their strategic position in the reorganization for their own benefit and to the detriment of public security holders, including the exaction of substantial fees and expenses having no reasonable relation to the value of services rendered.[7] For in equity receivership

[6] This is also the interpretation given by this Commission in its report to Congress on its investigation into the activities and functions of protective committees. See Appendix B, *infra*.

[7] Section 77B was revised following an investigation by a Special Senate Committee to Investigate Receivership and Bankruptcy Proceedings, S. Doc. No. 268, 74th Cong., 2nd Sess.; and an extensive study by the Securities and Exchange Commission entitled *Report on the Study and Investigation of the Work, Activities, Personnel, and Functions of Protective and Reorganization Committees*, Parts I–VII (1937–1938), hereinafter referred to as *S. E. C. Protective Committee Report*. Part VIII, published in 1940, is a summary volume.

The Commission's Report is referred to in S. Rep. No. 1916, 75th Cong., 3d Sess., p. 20, fn. 1; see also statement by Representative Chandler in 83 Cong. Rec. 9110 (June 13, 1938).

reorganizations, the payment of fees generally was arranged outside of the receivership, usually through the device of a separate charge upon the security holders who had assented to the plan of reorganization,[8] and the court had little or no control over these charges. The deposit agreement, under which most committees functioned, was viewed as a private contract between the committee and the security holders;[9] and under its terms the committee was given not only a lien on the deposited securities for the payment of all fees and expenses but in most cases also the sole right to determine the amount to be charged

On fees and expenses, see *S. E. C. Protective Committee Report*, Part I, pp. 211–217, 642–660; Part II, pp. 351–373; Part III, pp. 55–61, 125–127, 152–193; Part IV, pp. 87–97; Part VIII, pp. 231–269.

[8] See statement of Judge Coxe in *In re Paramount-Publix Corp.*, 12 F. Supp. 823, 827 (S. D. N. Y.); *United States* v. *Chicago, Milwaukee, St. Paul & P. Railroad Co.*, 282 U. S. 311; see also *S. E. C. Protective Committee Report*, Part I, pp. 642–648; Part III, 55–56, 59–60; Part IV, p. 62; Part VIII, p. 254; Finletter, *The Law of Bankruptcy Reorganization*, 17 (1939).

[9] *Habirshaw Electric Cable Co.* v. *Habirshaw Electric Cable Co., Inc.*, 296 Fed. 875 (C. C. A. 2), certiorari denied, 265 U. S. 587; *Fuller* v. *Venable*, 118 Fed. 543 (C. C. A. 4). Cf. also *United States* v. *Chicago, Milwaukee, St. Paul & P. Railroad Co.*, 282 U. S. 311. This case involved an equity receivership reorganization and arose prior to the passage of Section 77. This Court held that the Interstate Commerce Commission, though having jurisdiction over securities issued in railroad reorganization, did not have the power under Section 20a of the Interstate Commerce Act to inquire into the fairness of compensation provided for in an agreement between the protective committee and the security holders.

without any provision for independent review.[10] Moreover, an independent action for damages or for an accounting, even within the limits of the agreement, was generally beyond the resources of the individual security holders[11] and was thwarted to a large extent by the broad exculpatory clauses which often found their way into the depositary agreement.[12]

The foregoing practices led to such serious abuses that at one time it was recommended that committees should be prohibited from looking to security holders for any compensation at all

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[10] In *S. E. C. Protective Committee Report*, Part I, pp. 646–647, the Commission noted:

"This means that in the 705 cases not associated with Section 77 or Section 77B proceedings machinery was provided for having some independent person or agency review the amount of the fees and expenses of these committees in only 2.13 percent of the cases. In the balance of the cases, numbering 690, the committee had reserved to itself the right to determine, within the limits prescribed by the agreement, the amount which it could charge for fees and expenses. And in 403 of these 690 cases, the agreements prescribed no limitations. These fiduciaries, therefore, had in the vast majority of the cases provided machinery whereby they became the sole arbiters of the worth of their own services and of the propriety of their expenses. As we have pointed out, it was usually provided that the compensation to be fixed by the committee must be 'reasonable.' But this restriction in and of itself would mean little, since the committee, and the committee alone, was to determine what was 'reasonable'."

[11] See *S. E. C. Protective Committee Report*, Part I, p. 647.

[12] See, for example, *Van Sicklen* v. *Bartol*, 95 Fed. 793 (E. D. Pa.). See, generally, *S. E. C. Protective Committee Report*, Part VIII, pp. 217–221, 237–241.

and be limited to such compensation as the bankruptcy court might allow out of the estate.[13] Although this recommendation was not expressly adopted,[14] supervision by the bankruptcy court of fees to be charged to the security holders by a committee or its counsel was obviously necessary and was expressly provided for in Chapter X. To place the fee agreement, such as is involved herein, beyond the purview of the bankruptcy court is to ignore the broad provisions of Section 221 (4) and other statutory and equitable powers of the bankruptcy court discussed below, as well as to open the door to the very evils which Congress had intended to eliminate by centralizing control over all fees in the bankruptcy court.

3. Judicial scrutiny over the fee claims of petitioners herein must also be viewed as but an integral part of the control over protective committees and its agents which was exercised by the bankruptcy court under Section 77B, and which Chapter X intended to broaden and to render more effective.[15] Such controls are all-inclusive. They extend to qualification of the committee's

[13] See Special Senate Committee to Investigate Receivership and Bankruptcy Proceedings, S. Doc. No. 268, 74th Cong., 2d Sess., p. 41.

[14] *Cf.* Section 212, note 23, *infra*, which authorizes the bankruptcy court to disregard any agreement affecting the interests of security holders if the agreement is "unfair or not consistent with public policy."

[15] See *Securities and Exchange Commission* v. *U. S. Realty & Improvement Co.*, 310 U. S. 434, 448–450.

personnel, as well as to every aspect of its functions and activities. For example, the bankruptcy court could disqualify a person with conflicting interests from serving on a committee for public security holders,[16] and could enjoin the committee from communicating with the security holders it otherwise represents if the proper administration of the reorganization so requires.[17] Courts of bankruptcy also have denied compensation to committees and their attorneys or to any other fiduciary for trading in the securities of the debtor in the course of the reorganization,[18] or

[16] *In re Realty Associates Securities Corp.*, 56 F. Supp. 1008 (E. D. N. Y.); *In re Rosenbaum Grain Co.*, 13 F. Supp. 600 (N. D. Ill.).

[17] *In re Schroeder Hotel Co.*, 86 F. (2d) 491 (C. C. A. 7). See also *In re Glen Sheridan Realty Trust*, 90 F. (2d) 466 (C. C. A. 7).

In the *Schroeder* case, *supra*, the court after citing the "scrutiny clause" of former Section 77B (b) (10) said at pp. 493–494:

"* * * Obviously, the court, in view of the purpose of the act and its express provisions, has the power to make effective the jurisdiction granted by Congress under the constitutional power in bankruptcy and to prohibit acts of parties before it, tending to prevent the exercise of the jurisdiction and the achievement of its purposes. If this power does not exist, the purpose of the law and the jurisdiction of the court to enforce it are defeated. To prevent the attainment of the legitimate ends contemplated 'is to defeat the very end the accomplishment of which was the sole aim of the section' and thereby to render its provisions futile.' *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, 55 S. Ct. 595, 606, 79 L. Ed. 1110."

[18] See *In re Paramount-Publix Corp.*, 12 F. Supp. 823 (S. D. N. Y.); *In re Republic Gas Corp.*, 35 F. Supp. 300 (S. D.

where an actual or potential conflict of interest was shown;[19] and in the exercise of its equitable powers the bankruptcy court will require an accounting for any pecuniary profits a fiduciary may secure from his position of trust in the reorganization.[20]

To render the Court's control more effective, its supervisory powers have been extended specifically to all agreements under which committees or other persons may serve in a representative capacity for public security holders.[21] Thus, under Section 211 (11 U. S. C. § 611) committees or other persons representing twelve or more creditors or stockholders, who appear in the proceedings, are required, *inter alia* to file under oath a statement to include, among other things, a copy of the instrument authorizing the

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N. Y.): *In re Midland United Co.*, 159 F. (2d) 340 (C. C. A. 3). This equitable doctrine is presently embodied in Section 249, 11 U. S. C. § 649.

[19] *Woods* v. *City Nat. Bank & Trust Co.*, 312 U. S. 262; *American United Mutual Life Insurance Co.* v. *City of Avon Park*, 311 U. S. 138.

[20] *Young* v. *Higbee Co.*, 324 U. S. 204; *Young* v. *Potts*, 161 F. (2d) 597 (C. C. A. 6).

[21] See *In re Realty Associates Securities Corp.*, 56 F. Supp. 1008, 1009 (E. D. N. Y.). See also Senate Report No. 1916 on H. R. 8046, 75th Cong., 3d Sess., p. 33, wherein it is stated:

"Sections 210, 211, and 212 grant to the judge control over protective committees and other representatives of creditors and stockholders. To enable the judge to exercise his control effectively, relevant information is required to be furnished to the court concerning employment and interests of such representatives, and the interests of the persons represented."

representation and a recital of the pertinent facts and circumstances pertaining to their employment.[22] The purpose of these disclosure requirements is indicated in part by the so-called "scrutiny clause" included in Section 212, pursuant to which the court is empowered to set aside any such agreements or any terms thereof which the bankruptcy court finds to be "unfair or not consistent with public policy."[23]

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[22] Section 211 provides in pertinent part:

"Every person or committee, representing more than twelve creditors or stockholders, and every indenture trustee, who appears in the proceeding shall file with the court a statement, under oath, which shall include—

"(1) a copy of the instrument, if any, whereby such person, committee, or indenture trustee is empowered to act on behalf of creditors or stockholders;

"(2) a recital of the pertinent facts and circumstances in connection with the employment of such person or indenture trustee, and, in the case of a committee, the name or names of the person or persons at whose instance, directly or indirectly, such employment was arranged or the committee was organized or formed or agreed to act; * * *."

[23] Section 212 provides that:

"The judge may examine and disregard any provision of a deposit agreement, proxy, power or warrant of attorney, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, by the terms of which an agent, attorney, indenture trustee, or committee purports to represent any creditor or stockholder, may enforce an accounting thereunder, may restrain the exercise of any power which he finds to be unfair or not consistent with public policy and may limit any claim or stock acquired by such person or committee in contemplation or in the course of the proceeding under this chapter to the actual consideration paid therefor."

It may be noted that Section 212 refers to "creditor or stockholder." Section 77B (b) (10), the predecessor provision to Section 212 referred only to "creditor."

The basic assumptions underlying these various statutory or equitable controls is that with the wide diffusion in the ownership of corporate securities, protective committees and their agents occupy a strategic position in the reorganization; that any agreements between committees and security holders is bound to be one-sided; that unless all aspects of the committees' functions, including agreements with security holders, are subject to the supervision and regulation by the reorganization tribunal or some other specialized agency,[24] the standard of loyal and disinter-

[24] Compare Section 77 (p), 11 U. S. C. § 205 (p), which provides in substance that committees or any other persons may solicit proxies or deposits in a pending proceeding, only upon prior application to the Interstate Commerce Commission, which must disclose certain relevant information, including "the compensation and expenses to be received by the applicant, its agents and attorneys, for their services." Section 77 (p) further provides in pertinent part that such solicitations may be authorized by order only if the Commission "* * * finds that the terms and conditions upon which such solicitation, use, employment or action is proposed are reasonable, fair, and in the public interest, and conform to such rules and regulations as the Commission may provide."

The purpose of this provision is to protect the public, the security holders and the debtor corporation against excessive fees payable either by the debtor or by the security holders. See House Rep. No. 1283 on H. R. 8587, 74th Cong., 1st Sess. p. 3 (1935). See also Special Rules of Procedure promulgated by the Interstate Commerce Commission under Section 77 (p), paragraphs 9 (j), (q) and (r), C. C. H. Bankruptcy Law Ser. ¶ 7101.

The explicit reference to compensation and expenses in Section 77 (p) was probably inserted in view of this Court's decision in *United States* v. *Chicago, Milwaukee, St. Paul &*

ested service[25] cannot be fully attained, and injury to the interests of public security holders follows.

4. We believe that the foregoing considerations necessarily extend to all fee arrangements, and make it essential that the bankruptcy court inquire into the propriety and fairness of the compensation which security holders may have agreed to pay a committee, its counsel or any other person serving in a representative capacity in the reorganization. Even in ordinary trust administration, courts of equity have exercised control over trustees' allowances and for good cause have

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P. Railroad Co., 282 U. S. 311, summarized note 19, *supra*. See statement of Senator Wheeler on this subsection, 79 Cong. Rec. 13,765 (Aug. 20, 1935).

Somewhat comparable controls were vested by the Michigan legislature in an administrative agency created under a special statute passed to supervise and regulate protective committees within that state. See Mich. Stats. Ann. 1938 §§ 27.1296, 27.1297. For a discussion of the Michigan Public Trust Commission Act see *S. E. C. Protective Committee Report*, Part VIII, pp. 387–417.

The administrative controls over protective committees in California are discussed in *S. E. C. Protective Committee Report*, Part VIII, pp. 367–386. Jurisdiction by the Commissioner of Corporations over protective committees is based on the state Blue Sky Law, Deering Gen. Laws 1944, Act 3814, section 2 (a) of which includes certificate of deposit within the definition of "security." This was supplemented in 1937 by the enactment of the Securities Owners Protection Law, Deering Gen. Laws 1944, Act 3815.

[25] *Woods* v. *City Nat. Bank & Trust Co.*, 312 U. S. 262, 268; *American United Mutual Life Ins. Co.* v. *City of Avon Park*, 311 U. S. 138, 147.

even reduced or denied such compensation although previously fixed by the settlor or by statute.[26] As bankruptcy courts are courts of equity,[27] the adaptation of the same general powers for the purpose of limiting committees and their attorneys or other fiduciaries to fees reasonably commensurate with the value of their services is, indeed, appropriate to the needs and requirements of bankruptcy reorganization. It follows, accordingly, that the agreement defining the terms and conditions under which the committee or its counsel is to represent security holders in the reorganization, including the cost of such representation to security holders, can no longer be regarded as a mere private contract subject to enforcement in accordance with its terms. In view of the all-inclusive provisions of Section 221 (4), the disclosure requirements of Section 211 and the broadened scrutiny provisions of Section 212, it is essential that such agreements be subject to judicial examination by the bankruptcy court, in order to safeguard the integrity of the reorganization process and to afford the public security holders the assurance that the committee and its attorneys will discharge their fiduciary responsibilities without overreaching and in a

[26] See 4 Bogert, *Trusts and Trustees* §§ 972, 979. See also Lewin, *Trusts*, 403–404 (14th ed. 1939).

[27] *Pepper v. Litton*, 308 U. S. 295, 304; *American United Mutual Life Ins. Co.*, 311 U. S. 138, 145.

manner which is fair and compatible with reorganization standards.[28]

A striking illustration is afforded by *In re McCrory Stores Corp.*, 19 F. Supp. 917 (S. D. N. Y.), affirmed 91 F. (2d) 947 (C. C. A. 2), certiorari denied, 302 U. S. 725, decided under the less inclusive provisions of Section 77B. In that case, a committee of creditors engaged an attorney, paying him a retainer of $25,000 and agreeing to pay him a further 10% of any proceeds paid to creditors. Eventually, creditors of the class represented by the committee were paid in full plus 19% interest. The aggregate amount to which the attorney would have been entitled under the contingent retainer at the conclusion of the case was over $64,000.00. Nevertheless, the District Court, after finding that the value of the attorney's services was $35,000, refused to permit him to collect the 10% contingent retainer agreed to between him and the committee and ordered an award to him of only $10,000 in addition to his fixed retainer of $25,000. Although, as we have seen (p. 9, *supra*), Section 77B (f) (5) provided only for judicial examination of fees to be paid to committees and reorganization managers out of the assets of the debtor's estate or by a successor corporation, the court held that the fee agreement was not enforceable. The court concluded that the congressional policy was to limit

[28] As illustrative of statutory standards applicable to fees claims see Section 62c, 249, 11 U. S. C. §§ 102c, 649.

attorneys representing public investors in reorganization to a reasonable fee commensurate with their services and that any agreement in contravention of that policy may be set aside under the "scrutiny clause" of Section 77B (b) (10). The district court stated (p. 921):

> * * * the duty is laid on the court to see to it that the amount to be received by counsel is no more than commensurate to the services rendered * * *
> * * * the standard of compensation set for those who perform services in the proceeding, whether payable by a group of creditors or out of the general funds of the estate, is the fair and reasonable worth of the services actually rendered, as distinct from the amount that may be agreed on by a committee in advance * * *.

On appeal, the Circuit Court of Appeals for the Second Circuit affirmed, holding that the "scrutiny clause" of Section 77B (91 F. (2d) at 949)—

> authorized him [the District Judge] to restrain the committee from proceeding under the contingent fee agreement after the reorganization petition was filed * * *.

And further (p. 950):

> Congress would certainly seem to have a * * * right to authorize the court in bankruptcy proceedings to allow attorneys only reasonable compensation out of estate funds belonging to their clients

and to subject arrangements for attorneys' fees to judicial scrutiny and supervision.

The same result is now even more clearly warranted under the broader provisions of Section 221 (4).[29]

Likewise, in *In re Philadelphia & Reading Coal & Iron Co.*, 61 F. Supp. 120 (E. D. Pa.) the court allowed a bondholders' committee and its counsel a fee out of the estate for certain services. For other services which they performed under their contract of employment and which did not benefit the estate, the court held that they were entitled to be paid by the bondholders and fixed an appropriate fee for such services. The court said (p. 127):

> * * * this portion of the services, though within the duties of both committee and counsel under their employment and undoubtedly a proper charge against the bondholders, is not compensable by the estate. I fix the reasonable value of such portion of the services at $7,500 and an allowance from the estate will be made in the amount of $92,500.[30]

[29] See Appendix B, *infra*.

[30] See also *Nolte* v. *Hudson Nav. Co.*, 47 F. (2d) 166 (C. C. A. 2). In this case, a creditors' suit, attorneys representing about 12% of the general creditors succeed in reducing the claims of secured creditors against the free assets and thereby increased the available fund for distribution to the general creditors. The court held that since the attorneys benefited the general creditors as a class they were entitled

An analogous situation has been passed upon by this Court in reorganization proceedings under Section 77 of the Bankruptcy Act, 11 U. S. C. 205, in *Reconstruction Finance Corporation v. Bankers Trust Co.*, 318 U. S. 164, reversing 129 F. (2d) 122 (C. C. A. 8).[31] The indenture trustee for the mortgage bonds filed a petition with respect to fees for services which were alleged to have been performed not for the benefit of the debtor but in furtherance of the interests of the bondholders for whom it was trustee. The indenture trustee claimed that it had a prior lien for all of these services under the terms of the idenfure and urged that the lien be enforced under the contract, without reference to the maximum fee allowances set by the Interstate Commerce Commission under Section 77 (c) (12). This Court held that the indenture trustee's claim for fees for services performed to advance the special interests of the bondholders under the trust indenture could be compensated only within the limits prescribed by the standards of Section 77 (c) (12), since such services are considered to have been performed "in connection with the proceedings and plan."

5. The fact that in the cases discussed above the claims for fees were made against the funds to be distributed in the reorganization, whereas

to a fee from the free assets to be distributed to the general creditors, and directed the district court to fix the reasonable value of such services.

[31] See also *In re New York, New Haven & Hartford R. Co.*, 46 F. Supp. 236 (D. Conn.).

in the present case the rights of petitioners are asserted against the shares of stock held in escrow by the Committee, does not affect the bankruptcy court's jurisdiction. For purposes of bankruptcy jurisdiction, it is not necessary that the controversy be tied to a particular *res* which is *in custodia legis*. The bankruptcy court's jurisdiction extends to all matters pertaining to the proper administration of the proceeding and to the safeguarding of the investors' interests in the reorganization.[32] Moreover, with respect to fees, as shown above, the bankruptcy court is required to supervise all fees regardless of the source of payment; it also exercises control over protective committees and those who act on their behalf; and under Section 212 it has the power to scrutinize all agreements affecting the interests of security holders, including fee agreements. It is evident, therefore, that the court's jurisdiction over fees cannot be defeated by the simple expedient of arranging for their payment out of funds or assets other than those which security holders will receive under the plan of reorganization. In either case the net result is the same. The security holders' interests in the reorganization is substantially impaired through excessive fee claims, whether

[32] *Young* v. *Higbee Co.*, 324 U. S. 204, 214; *Continental Ill. Nat. Bank* v. *Chicago, R. I. Pac. Ry Co.*, 294 U. S. 648, 675 *ff*; *In re Schroeder Hotel Co.*, 86 F. (2d) 491, 493 (C. C. A. 7), quoted note 17, p. 15, *supra*.

such claims are charged against the proceeds to be distributed in the reorganization or against the stock which represents a proportionate interest in the proceeds.

6. From the foregoing discussion it follows, we believe, that the fee agreement involved herein, is not a mere private contract outside the scope of the bankruptcy proceeding. Petitioners herein were retained as counsel for the Committee, and in that capacity performed for the Committee services in connection with, and incident to the reorganization, for all of which services they subsequently sought unsuccessfully an allowance out of the estate in the amount of $125,000. Among such services were those relating to the unsuccessful assertion in the stockholders' behalf of creditor claims under certain sinking-fund provisions pertaining to the preferred stock. At the request of the Committee petitioners also performed other services, such as inquiry into the trustee's sales of some of the debtor's property and in general into his management of the estate, thus to an extent duplicating or encroaching upon the functions of the trustee in reorganization. Although under the circumstances, petitioners may not be allowed compensation out of the estate, we assume on the basis of the present record that their services were within the proper scope of the Committee's undertaking or function and that for these services petitioners may be compensated by the security holders, if such

was the understanding of all the parties concerned.

The effect of the agreement, however, is not to oust the bankruptcy court of its powers and duties in a Chapter X reorganization. As attorneys for the Committee representing public security holders, petitioners are fiduciaries and, for reasons previously indicated, their compensation, whether payable out of the estate or by security holders, must be limited to an amount which is reasonable in accordance with reorganization standards. It was, therefore, the bankruptcy court's responsibility to examine the agreement in question and to appraise, in the light of the objectives of Chapter X, the appropriateness and fairness of the fee claim thereunder, and make that appraisal as part of the statutory policy of protecting both the debtor and its security holders against excessive fee claims.[33]

7. The cases cited by petitioners in their brief (pp. 16–18) do not deal with the issue involved herein, nor can they be reasonably interpreted as importing the far-reaching effects which petitioners urge. In general, such cases as, for example, *In re Mt. Forest Fur Farms of America*, 157

[33] As previously stated, the Commission expressed its opinion that the reasonable value of all services was $70,000, including those not compensable out of the estate. On that basis, petitioners would receive $32,500 as additional compensation from security holders, provided, of course, that petitioners could establish the obligation to pay therefor under the escrow agreement.

F. (2d) 640 (C. C. A. 6), involved petitions for fee allowances out of the estate filed by attorneys for a committee or for a group of security holders.[34] The courts disallowed the petitions on the ground that the particular services did not benefit the estate, and merely suggested that for such services the attorneys might look for compensation to the security holders, assuming, of course, that the deposit agreement or other authorization under which the attorneys functioned expressly or impliedly permitted. Disallowance of the fee claim as a charge against the estate, however, did not foreclose further consideration of that claim by the bankruptcy court, nor did it imply that for lack of bankruptcy jurisdiction the committee and its counsel have an unfettered power to exact compensation from the security holders they represent.[35]

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[34] This applies also to the following cases: *In re Standard Gas & Electric Co.*, 106 F. (2d) 215 (C. C. A. 3); *In re Watco Corporation*, 95 F. (2d) 249 (C. C. A. 7); *In re Middle West Utilities Co.*, 17 F. Supp. 359 (N. D. Ill.); *In re Paramount-Publix Corporation*, 12 F. Supp. 823 (S. D. N. Y.); *Cooke* v. *Bowersack*, 122 F. (2d) 977 (C. C. A. 8).

[35] Considered in its context the statement in *Greensfelder* v. *St. Louis Public Service Co.*, 114 F. (2d) 53, 64 (C. C. A. 8) (also referred to by petitioners), that

"the court was not concerned with the question of the amount of fees which Mr. Greensfelder's clients * * * might be obligated to pay him"

is merely a statement of fact; i. e., that the court below was considering only the reasonableness of compensation payable

The case of *Zweifel* v. *Trans-State Oil Co.*, 99 F. (2d) 650 (C. C. A. 5), also stressed by petitioners, involved an agreement between an attorney and the debtor providing for payment of additional compensation after the closing of the estate. The district court held that, in view of the agreement, the attorney was not entitled to any fees from the estate. This decision was reversed on appeal. The court held that the attorney was nevertheless entitled to a fee out of the estate for such services as benefited the debtor, and expressly withheld approval or disapproval of the agreement "as beyond our jurisdiction on this appeal." If, as petitioners urge, the *Zweifel* case should be interpreted as holding that the bankruptcy court had no jurisdiction over the agreement at all, the decision would be in conflict with cases under the old Section 77B [36]; and

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out of the estate and was not at the time considering fees the attorney might receive from his clients. It was not a holding that the court had no jurisdiction over such fees.

Compare also *In re Barlum Realty Co.*, 157 F. (2d) 408 (C. C. A. 6), wherein the court modified its judgment to permit the fee claimants to amend their petition to assert a claim of a different nature.

[36] See *Wright* v. *City National Bank & Trust Co.*, 104 F. (2d) 285 (C. C. A. 6); *Silver* v. *Scullin Steel Co.*, 98 F. (2d) 503 (C. C. A. 8); *In re Republic Gas Corp.*, 14 F. Supp. 703 (S. D. N. Y.).

London v. *Snyder*, 163 F. (2d) 621 (C. C. A. 8), is likewise irrelevant. In that case the court held that an attorney representing a purchaser of the debtor's property under a sale plan was not entitled to a fee out of the estate, notwithstanding that the purchaser also happened to be a creditor of the estate.

since the case arose before the enactment of Section 221 (4), it clearly is not the law today.[37]

The principal reason for judicial denial of compensation out of the estate for certain categories of services performed by a committee or its counsel on behalf of public security holders is the need of keeping fees to be paid out of the estate within reasonable limits. In a complex reorganization there are likely to be several committees in the field and as a result there will be some overlapping in function and duplication of effort. Also, a committee or other representative for public security holders may devote substantial efforts in asserting or litigating, however unsuccessfully, the particular claims or interests of the security holders it represents, and indeed its fiduciary responsibility to the security holders may even require that it take a position entirely hostile to the reorganization.[38] Accordingly, if, in order to keep the cost to the estate within reasonable bounds,[39] a request by a committee or its counsel for a fee is denied on the ground that the services rendered are not compensable out of the estate, this in nowise suggests that such services are not

[37] See *Brown* v. *Gerdes*, 321 U. S. 178; *In re P-R Holding Corp.*, 147 F. (2d) 895, 899 (C. C. A. 2).

[38] See *In re Philadelphia & Reading Coal & Iron Co.*, 61 F. Supp. 120, 126 (E. D. Pa.).

[39] See *In re Paramount Publix Corp.*, 85 F. (2d) 588, 590–591 (C. C. A. 2); *Straus* v. *Baker Co.*, 87 F. (2d) 401, 407 (C. C. A. 5).

germane to the Chapter X proceedings. On the contrary, as the courts have pointed out [40] and as this very case demonstrates (p. 26, *supra*), such services are within the legitimate function of the committee whose primary responsibility is to assert and to protect the interests of the class it represents and on whose behalf it appears in the reorganization.

In short, while security holders in a proper case may agree to compensate the committee or its counsel for services rendered for their benefit and which are not compensable out of the estate, it is equally clear, for reasons previously discussed, that the terms and conditions under which the committee and its counsel were retained must be subject to supervision by the bankruptcy court. It is inconceivable to us that the statutory and equitable controls of the bankruptcy court should extend to every aspect of the committee's functions and activities (see p. 14, *supra*) and yet should not be deemed applicable to fee agreements between the committee or its counsel and the security holders whose interest they represent in the proceedings. As we have seen, such agreements have been the source of grave abuse in the past, and the purpose of Chapter X was to

[40] See *In re Standard Gas & Electric Co.*, 106 F. (2d) 215, 216 (C. C. A. 3); *Straus* v. *Baker Co.*, 87 F. (2d) 401, 408 (C. C. A. 5); *In re Philadelphia & Reading Coal & Iron Co.*, 61 F. Supp. 120, 126 (E. D. Pa.). See also *R. F. C.* v. *Bankers Trust Co.*, *supra*.

enlarge the judicial control over protective committees and their agents, and thereby to prevent them, as fiduciaries, from profiting through their strategic position in the reorganization either by charging excessive fees or by any other means.

II

THE JURISDICTION OF THE BANKRUPTCY COURT OVER THE FEE CLAIM, WHICH IS THE SUBJECT OF THE PRESENT LITIGATION, IS EXCLUSIVE

Our analysis in Point I, showing that the bankruptcy court has jurisdiction over the fee agreement involved herein, points also to the conclusion that such jurisdiction is exclusive. Indeed, this is necessarily so in view of this Court's decision in *Brown* v. *Gerdes*, 321 U. S. 178. In that case this Court held that Section 221 (4) gave the bankruptcy court exclusive authority, as against the State courts, with respect to allowances payable out of the estate. If, as we have argued, Section 221 (4) also applies to other fees incident to the reorganization, it follows that the bankruptcy courts have exclusive jurisdiction over such fees as well. For it can hardly be said that Section 221 (4) gives the bankruptcy courts exclusive jurisdiction over one class of fees and non-exclusive jurisdiction over the other.

In considering a request for fees the bankruptcy court is not merely passing upon an ordinary claim the determination of which it might in its discretion relegate to a state court. Judi-

rial control over fees, as previously indicated, is a vital part of the administrative functions of the Chapter X court, having been conceived by Congress as a means, among others, of safeguarding the interests of security holders and of assuring a fair and equitable reorganization. That responsibility, accordingly, cannot be delegated to another tribunal, in the light of Section 1334 of 28 U. S. C. (formerly Section 256 of the Judicial Code, 28 U. S. C. § 371), which vests jurisdiction in the federal courts "exclusive of the courts of the States" over "all matters and proceedings in bankruptcy," and especially by reason of Section 221 (4). For Section 221 (4) conditions confirmation of the plan of reorganization upon judicial scrutiny and determination of all fees, thus clearly implying that no plan can be fair and equitable which leaves the estate and its security holders exposed to the risk of exorbitant fees. Considered in this context the administrative control over fees exercised by the bankruptcy court is as indispensable to the reorganization process as the court's independent determination that the plan of reorganization is fair and equitable.

It was for these reasons that *Brown* v. *Gerdes*, 321 U. S. 178, held that fee claims against the estate are within the exclusive jurisdiction of the bankruptcy court and that exercise of such jurisdiction can neither be dispensed with nor discharged in another forum. The same considera-

tions are equally applicable to fee claims asserted, as in this case, by petitioners against security holders pursuant to a contract, since, as previously shown, 221 (4) is not limited to fees payable by the estate but is also applicable to all fees regardless of the source of payment. We submit, therefore, that the fee agreement involved in this proceeding was subject to examination and review exclusively by the bankruptcy court wherein the reorganization proceedings are pending, and that under no circumstances can the state court acquire with respect to such agreement the jurisdiction which Congress conferred solely upon the bankruptcy court and in terms denied to any other tribunal.

Petitioners also argue that since the plan of reorganization has already been consummated, Section 221 (4) cannot affect the validity of the fee agreement involved herein. They urge that Section 221 (4), insofar as it extends to fees payable by security holders, applies only to such fee arrangements as are incorporated within the plan and that the court's only power is to refuse confirmation of the plan (Pet. Brief, p. 14). But Section 221 (4) expressly provides also for judicial approval of all fees which are "to be fixed after confirmation of the plan"; and in fact, in most reorganizations the order confirming the plan generally reserves jurisdiction for the consideration of all requests for fees subsequent to

confirmation. Accordingly, when petitioners herein submitted their fee petition for all their services to the Committee, it was the exclusive responsibility of the bankruptcy court to review petitioners' request in its entirety, and to limit petitioners to a reasonable fee which will give recognition to their services to the estate and to whatever rights, if any, they might have under the agreement in question.[41]

Finally, exclusive jurisdiction of the bankruptcy court over all fees is also essential from the standpoint of the practical problems inherent in all fee determinations. An informed decision on whether a particular fee claim is reasonable depends upon an intimate knowledge of the work performed, an understanding of the specific problems and issues to which this work was directed, and an over-all appraisal of the extent to which the services rendered were necessary and effective for the protection of the class of security holders represented by the fee claimant. Moreover, claims to compensation for services payable out of the estate and for services chargeable to security holders commonly present interrelated issues of fact or law which cannot feasibly be

[41] It may also be noted that a dismissal of the state court action would not bar reconsideration of petitioners' claims by the bankruptcy court. Since the reorganization proceedings are still pending, petitioners could still apply to the bankruptcy court for appropriate relief and consideration of their fee claims.

separated for purposes of determination.[42] Needless to say, another tribunal than the bankruptcy court is hardly in a position properly to discharge this function, even if we were to assume that under its general equity jurisdiction another court could and would exercise the broad supervisory powers over fees granted to the reorganization judge.

CONCLUSION

The order of the New York Court of Appeals should be affirmed and the proceedings in the state court should be dismissed.

Respectfully submitted.

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[42] In the instant case, for example, the recovery if any under the escrow agreement has a direct bearing upon the amount properly payable from the assets of the estate. The allowance of $37,500 previously fixed by the District Judge was originally made in the understanding that the escrow agreement had been set aside (R. 18). It is evident that petitioners will not be entitled to the full allowance from the estate of $37,500 if under the escrow agreement there is recovered a substantial amount which added to the allowance of $37,500 would result in an unreasonable total fee.

APPENDIX A

The following are the pertinent sections of Chapter X (Act of June 22, 1938, 52 Stat. 883, 11 U. S. C. 501 *et seq.*) discussed in the brief:

211 (11 U. S. C. 611). Every person or committee, representing more than twelve creditors or stockholders, and every indenture trustee, who appears in the proceeding shall file with the court a statement, under oath, which shall include—

(1) a copy of the instrument, if any, whereby such person, committee, or indenture trustee is empowered to act on behalf of creditors or stockholders;

(2) a recital of the pertinent facts and circumstances in connection with the employment of such person or indenture trustee, and, in the case of a committee, the name or names of the person or persons at whose instance, directly or indirectly, such employment was arranged or the committee was organized or formed or agreed to act; * * *

212 (11 U. S. C. 612). The judge may examine and disregard any provision of a deposit agreement, proxy, power or warrant of attorney, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, by the terms of which an agent, attorney, indenture trustee, or committee purports to represent any creditor or stockholder, may enforce an accounting thereunder, may restrain the exercise of any power which he finds to be unfair or not consistent with public policy and may limit any claim or stock acquired by such person or committee in contem-

plation or in the course of the proceeding under this chapter to the actual consideration paid therefor."

221 (11 U. S. C. 621). The judge shall confirm a plan if satisfied that * * *

(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge;

242 (11 U. S. C. 642). The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—

(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;

(2) by any other parties in interest except the Securities and Exchange Commission; and

(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission.

APPENDIX B

The construction of the provisions and purposes of Chapter X urged herein is in accord with that expressed by the Securities and Exchange Commission in Part VIII of its *Protective Committee Report* to Congress referred to *supra*.[1] Although this part of the Report was formally submitted to Congress about two years after the enactment of Chapter X, we submit that weight may be accorded to the nearly contemporaneous interpretations expressed therein by an agency which had played an important role in the adoption of the many reforms incorporated under Chapter X. Referring to the jurisdiction conferred upon the bankruptcy court under Section 77B and Chapter X, the Report states at pp. 253–4:

> The supervisory power of the court [under Section 77B] over the amount of the fees received by parties to a reorganization was broader than the court's affirmative power to grant allowances out of the estate to these parties. Thus, any allowance of compensation or reimbursement for expenses, when paid by the debtor or by any new corporation acquiring its assets, was subject to final determination by the court. In addition, it was provided that "all amounts to be paid to committees or reorganization managers, whether or not by the debtor or any such corporation" must receive the approval of the court as a condition of confirmation of the plan.

[1] See note 11, *supra*.

There is little argument against, and much good reason for, subjecting all compensation and expenses, from whomsoever received, to the scrutiny and necessity of approval by the court. The provision last quoted above had the merit of supplying judicial scrutiny in the event, for example, of an attempt to compensate reorganization managers or protective committees by the device of a separate charge upon creditors or stockholders who assented to the plan of reorganization. But it lacked inclusiveness, since in terms it applied only to the fees and expenses of managers and committees. To a limited extent; i. e., as to committee attorneys not paid out of the general estate, the courts were able to overcome this difficulty through use of the so-called "scrutiny" clause of Section 77B. Thus, where a creditors' committee, in behalf of those whom it represented, contracted to pay its attorney 10 percent of any dividends or proceeds of payment paid to creditors represented by the committee, it was held that this exercise of the committee's power, and hence the attorney's remuneration, was subject to review and modification by the court, through the express power in the statute to scrutinize and disregard committee "authorizations."[2] Preferably, however, the court's power over compensation and expenses of any persons concerned in the proceedings should be a plenary power to review their reasonableness, from whatever source paid, and such power has now been granted to the courts by the provisions of Chapter X [Section 221 (4)].

[2] This is a summary of the *McCrory Stores* case, discussed pp. 21–23, *supra*.

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